

~~ORIGINAL~~
No. 12066

~~Docketed~~

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

DIAMOND FOTOPULOS and THOMAS FOTO-
PULOS and JOAN FOTOPULOS, minors, by
and through their guardian ad litem, Diamond
Fotopulos,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED

JAN 24 1949

PAUL P. O'BRIEN,
CLERK

No. 12066

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

DIAMOND FOTOPULOS and THOMAS FOTO-
PULOS and JOAN FOTOPULOS, minors, by
and through their guardian ad litem, Diamond
Fotopulos,
Appellees.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	6
Appeal:	
Certificate of Clerk to Transcript of Record on	26
Certificate of Clerk to Supplemental Tran- script of Record on.....	263
Designation of Record on (USCA)	250
Designation of Additional Documents for Record on	262
Notice of	22
Orders Extending Time to Docket.....	24, 25
Praeceptum on	23
Statement of Points on (DC).....	24
Statement of Points on (USCA)	249
Certificate of Clerk to Transcript of Record on Appeal	26
Certificate of Clerk to Supplemental Transcript of Record on Appeal	263
Complaint	2
Designation of Record on Appeal (USCA)....	250

ii.

	PAGE
Designation of Additional Documents for Rec- ord on Appeal	262
Excerpt from Federal Bureau of Investigation Report of Mathew J. Lightbody	7
Findings of Fact and Conclusions of Law	15
Judgment	21
Letter from Carroll S. Bucher to Judge George B. Harris filed March 23, 1948	260
Memorandum of Plaintiff of Actuarial Factors	253
Names and Addresses of Attorneys	1, 251
Notice of Appeal	22
Order (Trial Court's Opinion)	13
Orders Extending Time to Docket Appeal	24, 25
Praecipe	23
Statement of Points on Appeal (DC)	24
Statement of Points on Appeal (USCA)	249
Stipulation of Facts between Counsel, filed Dec. 4, 1947	252
Transcript of Proceedings	27

Witnesses for Plaintiffs:

Balestracci, Peter	
—direct	240
—cross	242

Witnesses for Plaintiff—(Cont'd)

Bianchi, Arthur

—direct	226
—recalled, cross	238
—redirect	239

Brown, Clarence J.

—direct	231
—cross	236

Duba, John

—direct	70
—cross	73
—redirect	76
—recross	76

Failor, Harry A.

—direct	77
—cross	82

Fotopulos, Mrs. Diamond

—direct	96
—cross	101
—recalled, direct	208

McNeil, Justin L.

—direct	88
—cross	91

Ryan, Russell C.

—direct	32
—cross	39

Witnesses for the United States:

Bailey, Charles Arthur (Deposition)	
—direct	124
—cross	136
—redirect	162
—recross	163
Cooper, Sidney Preston	
—direct	58
—cross	63
Crahan, Thomas F.	
—direct	67
Gaber, John Frank	
—direct	115
—cross	118
Hammond, Roy Lee (Deposition)	
—direct	166
—cross	182
—redirect	198
—recross	201
Jenkins, Terry O.	
—direct	108
—cross	113
Lightbody, Mathew J.	
—direct	105
—cross	107
Wirthheim, Morris	
—direct	50
—cross	57

NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY,
United States Attorney,
Northern District of California.
Post Office Building,
San Francisco, California.

Attorney for Defendant and Appellant.

CARROLL S. BUCHER,
924 Mills Building,
San Francisco, California.

Attorney for Plaintiffs and Appellees.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 26833-H

DIAMOND FOTOPULOS and THOMAS FOTOPULOS, and JOAN FOTOPULOS, Minors,
by and Through Their Guardian ad litem, DIAMOND FOTOPULOS,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR DAMAGES UNDER
FEDERAL TORT CLAIMS ACT

Plaintiffs complain of the defendant above named
and for cause of action allege:

I.

That at all times herein mentioned a certain Charles A. Bailey was an employee of a federal agency of the United States of America, defendant herein, to-wit: a soldier for the Army of the United States, and was acting in the course and scope of said employment.

II.

That the City and County of San Francisco, State of California, where an accident, hereinafter alleged, occurred, is located in and is a part of the Northern District of California, Southern Division, and by reason thereof is within the juris-

diction of the above-entitled United States District Court.

III.

That plaintiff Diamond Fotopulos is the widow of Peter Fotopulos, deceased, and that she and the said deceased intermarried on the 24th day [1*] of November, 1935, and ever since were husband and wife to the date of the death of the said Peter Fotopulos on the 10th day of January, 1947; that Thomas Fotopulos, aged ten (10) years and Joan Fotopulos, aged nine (9) years, are the children of Diamond Fotopulos and Peter Fotopulos, deceased; that before the complaint herein was filed Diamond Fotopulos was appointed Guardian ad litem of Thomas Fotopulos and Joan Fotopulos, minors, for the purpose of representing and acting for them as plaintiffs in the prosecution of this action; that all of the plaintiffs were and are residents of San Mateo County, State of California, which county is within the Northern District of California, Southern Division, and within the jurisdiction of the above-named United States District Court.

IV.

That Van Ness Avenue and Bush Street are public streets and thoroughfares in the City and County of San Francisco, State of California.

V.

That on the 23rd day of December, 1946, at the hour of 9:30 a.m. of said day, the said Peter Foto-

* Page numbering appearing at foot of page of original certified Transcript of Record.

pulos was driving his Dodge automobile light truck in a northerly direction on Van Ness Avenue near Bush Street and at the same time and place the defendant, The United States of America, by and through Charles A. Bailey, an employee of one of its federal agencies, to-wit: the Army of the United States, acting in the course and scope of his employment, did so carelessly, negligently and recklessly drive and operate a certain truck owned by the Post Motor Pool, United States Army, an agency of the defendant above named, in a northerly direction, so as to cause the said Army truck to collide with the light automobile truck of Peter Fotopulos, deceased; that as a proximate result of said negligence, carelessness and recklessness of said Charles A. Bailey, the said Peter Fotopulos, deceased, was caused to sustain personal injuries which said injuries caused his death on the 10th day of January, 1947.

VI.

That by reason of the death of the said Peter Fotopulos, the plaintiff, Diamond Fotopulos has suffered, through said death, the loss of her husband and his society, comfort, support and services to her; [2] that the said plaintiffs Thomas Fotopulos and Joan Fotopulos, minors, the children of the said Peter Fotopulos, deceased, were thereby deprived of the care, nurture, training, society, support and education of their father.

VII.

That by reason of the said negligence, carelessness and recklessness of the said defendant, The

United States of America, by and through one of its agencies' employees and as a proximate result thereof, plaintiffs have been damaged in the aggregate sum of One hundred thousand (\$100,000.00) Dollars.

Wherefore plaintiffs pray judgment against the defendant as follows:

1. For the sum of One hundred thousand (\$100,000.00) Dollars together with their costs herein expended.

2. For such other and further relief as to the Court may appear meet and proper.

CARROLL S. BUCHER,
Attorney for Plaintiff.

State of California,
City and County of San Francisco—ss.

Diamond Fotopulos, being duly sworn on her oath deposes and says: that she is one of the plaintiffs in the above-entitled action; that she has read the foregoing Complaint and knows the contents thereof that the same is true of her own knowledge, except as to the matters therein alleged on information or belief, and as to such matters she believes it to be true.

/s/ DIAMOND FOTOPULOS.

Subscribed and sworn to before me this 28th day of January, 1947.

ALFRED D. MARTIN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Jan. 29, 1947. [3]

[Title of District Court and Cause.]

ANSWER

Now comes the defendant and answering the complaint herein denies and alleges as follows:

I.

Denies all the allegations of paragraphs I, III, VI and VII.

II.

Answering paragraph V, denies all the allegations thereof except that it is admitted that on the 23rd day of December, 1946, at or about the hour of 9:00 a.m. said Peter Fotopulos was driving his Dodge light truck automobile in a northerly direction on Van Ness Avenue near Bush Street. [4]

For a further and separate defense, defendant alleges:

I.

That said Peter Fotopulos was careless and negligent in and about the matter set forth in said complaint and carelessly drove and operated his automobile and that said carelessness and negligence of Peter Fotopulos was the proximate cause of the alleged damages and proximately contributed thereto.

Wherefore defendant prays that the action be dismissed and that it have its costs incurred herein.

/s/ FRANK J. HENNESSY,

United States Attorney,

Attorney for Defendant.

By R. B. McMILLAN,

Assistant U. S. Attorney.

[Endorsed]: Filed Sept. 19, 1947. [5]

(Copy)

Excerpt from Federal Bureau of Investigation

REPORT OF MATTHEW J. LIGHTBODY

San Francisco, 11-17-47.

Diamond Fotopulos, et al.

No. 26833

* * *

10/28/47.

“Dr. John J. Kingston, Coroner, 650 Marchant Street.

“Autopsy 1/10/47 by Dr. Milton Rosenthal, 858½ Clayton, S. F.

“Case No. 91—Necropsy Department.

The subject is a well developed, somewhat obese, adult white male appearing about 49 years of age. There is slight rigor mortis and well developed hypostasis. There is a 20 cm. verticle, right abdominal surgical wound, held together by clips, and lateral to this wound is a wound of an ileostomy. There is no subcutaneous ecchymosis.

Incision: Made into a peritoneal cavity which contains about 500 cc. of yellow green pus which is distributed in the right colonic gutter and over the dome of the right lobe of the liver. There is a corresponding acute inflammatory change with discoloration, fiber deposition on the fat and ascending colon and dome of the liver in this region, but the peritonitis does not extend elsewhere. There is no walling off of a sub-splenic abscess. Dissection of the region and of the vessels show the following: About the first 30 cm. of the ascending

colon show a colonic wall which is thin, necrotic, and hemorrhagic. About 12 cm. above the cecum a three cm. perforation has been sutured; it appears not to have disrupted. Off the cecum itself there is another suture perforation, about 1 cm. in size, it is also intact. There is the stump of an appendix recently removed with a purse-string suture. The region of the cecum is also involved in the peritonitis. About 20 cm. from the ilio-cecal valve the ileum has been introduced into the ileostomy stab wound and the ileostomy appears to be functional without perforation. The considerable amount of ileocecal fat and retoperitoneal fat in the region shows a great deal of—with induration, petechial hemorrhages, and other evidences of subacute inflammation. [6] No neoplastic tissue is found in the vessels about this region and they contain no thrombi. The pelvic veins, inferior vena cava, as well as the corresponding arteries are dissected out and the inferior mesenteric vein and artery, particularly, contain no thrombi, nor do the other vessels in this region.

Liver: The liver is of normal size and configuration. The peritonitis on this surface has been described. The organ itself has normal color and architecture except for ill defined areas of yellow discoloration of the toxic type. The billiary tract is not remarkable. The pancreas shows no hemorrhage or necrosis, although there is some post mortem autolysis. The Spleen is not enlarged. The stomach contains a small amount of chyme without unusual odor. The result of the gastro-intestinal

tract shows moderate dilatation, particularly of the small intestine. This is not an advanced ileus.

Kidneys: The kidneys are of normal size and contour. The left kidneys contain two rather large atherosclerotic cysts with thin smooth walls and one contains some brown purpuric, necrotic material. There is no grossly visible inflammatory reaction, although the tissue is pale, the cortices are regular and well differentiated. The ureters are not thickened or dilated. The bladder contains a small amount of turbid yellow urine. The mucosa is smooth and white. The femoral veins are opened and the more distal portions are milked. No thrombi are expressed.

Heart: The heart is of normal size and configuration. The coronary arteries show moderate atherosclerosis without occlusion. The myocardium shows no degeneration, fibrosis, or necrosis. The valvular configuration is not remarkable. The pulmonary vessels contain no thrombi. The lungs show moderate congestion and edema, particularly in hypostatic regions. The bronchi and trachea are empty.

Diagnosis: Perforations and necrosis of ascending colon, probably traumatic, with acute subdural peritonitis. Operative repair of perforations and operative ileostomy. Appendectomy.

Pathological Department—Dr. Jesse Carr.

Coronary System: Sections show an unusual degree of sclerosis in all [7] the branches. There is also an advanced sclerosis of the splenic artery.

Bowel: The bowel and liver are as described by the autopsy surgeon and the ruptures of the bowel are closed by catgut sutures. The bowel adjacent to and in the areas of necrosis and suture show a hemorrhagic discoloration with a loss of structure, but there is no direct evidence of trauma seen here at this time.

Diagnosis: Perforation of the ascending colon with surgical intervention and generalized peritonitis. Toxic degeneration of the viscera.

Microscopic—Dr. Jesse E. Carr.

Coronaries: The coronary arteries show only a moderate sclerosis of the lumina and are patent. There are thrombi excepting in one artery where there is an aginal thrombosis of a portion of the lumen and a few erythrocytes and leukocytes adhere to one side of the vessel wall.

Bowel: Section of the bowel show a mucosa which is degenerating but which shows no infection. This mucosa is degenerating apparently because it is cutting off the circulation terminally but not early. From the basal layer of the mucosa and muscularis mucosa out the muscularis and mucosa show a gradually increasing grade of fibrino-purulent exudate and infiltration and the majority of the pathological change seen in these sections if first in the peritoneum, which it is oldest, and then extending into the muscle where it is more gradually developing. The lesions have not yet reached into the mucosa in an inflammatory sense.

Diagnosis: Peri-typhlitis, with perforation of the cecum and generalized peritonitis.

Operating Record—St. Francis Hospital, January 8, 1947, Dr. Russell C. Ryan.

Pre-operative Diagnosis: Acute appendicitis.

Surgeon: Dr. Russell C. Ryan.

Assistants: Dr. Musser, Dr. Charlton.

Details: Five days ago, this patient states that he had sudden abdominal pain, suggestive of an appendix, but for the four ensuing days took [8] cathartics and otherwise treated himself. He claims that prior to this he felt in perfectly good health. On the fifth day he was seen by Doctor Musser and ordered into the hospital. At that time he had severe and marked tenderness over his gall bladder region and in the lower right abdominal quadrant, where there was definite guarding and rebound tenderness. Rectal examination was negative. The man had an exceedingly fat abdominal wall and palpation at best was difficult. Tentative diagnosis of an acute appendix was made, although the possibility of a secondary cholecystitis was borne in mind. On the sixth day, and being no better, the patient agreed to an operation.

A right parallel rectus incision was made and on entering the abdomen there was a considerable amount of fluid. The appendix was found, and aside from a moderate amount of infection, was otherwise normal. It was routinely removed. A large mass, fully the size of an adult fist, was found in the upper center abdomen but rather deep. This mass had perforated and there was pus and fecal matter. The area was walled off and with a considerable amount of difficulty the mass

was removed. It appears to be a large diverticulum surrounded with omentum, but by reason of the further widespread and rather nodular elevations over the posterior abdominal wall, the possibility of a malignancy cannot be ruled out until a pathological report is obtained. The mass was enucleated, a toilet of the peritoneum attended to, and opening in the bowel from which issued fecal matter was closed in two layers of sutures. This apparently was about two inches long and an inch wide and seemed to be the base of the abscess mentioned above. After closing the bowel, the undersigned felt that there was a great question as to whether or not this bowel would open again or become obstructed; for this reason, brought the cecum to the abdominal wall and opened it (cecostomy). A drain was inserted deep under the abdomen, a generous quantity of penicillin was dispensed, as well as an equally generous amount of sulfa powder. The peritoneum was closed with two strands of No. 2 plain and fascia with stainless steel wire. [9] Retention sutures were placed and the skin closed with clips.

Pathological Report—St. Francis Hospital—January 8, 1947. Dr. K. B. Eichorn (t).

Patient—Peter Fotopulos.

This specimen consists of an irregular mass of hemorrhagic, fibro-fatty tissue 9.5 x 4.0 cm. in size and an appendix 6.- x 0.5 cm. in size. The mass of fat contains a large area of hemorrhage and necrosis with a soft, shaggy lining and measuring approximately 5.5 x 3.5 cm. There are addi-

tional adjacent patches of hemorrhage in this tissue. There are no evidences of tumor. One area of the specimen bears a fairly wide patch of fibrinous exudate on the surface. The appendix shows much fibrosis surrounding a pin-point lumen with a small amount of fecal matter in the more widely patent lumen of the proximal half of the organ. There is no evidence of active inflammation grossly.

Microscopic Diagnosis: Acute peritonitis with multiple abscesses, hemorrhage, and organization in fat. Healed appendix.

Note: There is no evidence of tumor nor of specific infection.

Roentgen Department—St. Francis Hospital—January 8, 1947. Dr. P. A. Miller.

Case No. 71236—Mr. Fotopulos.

Flat film of abdomen reveals no evidence of pathology.

[Endorsed]: Filed Jan. 27, 1948. [10]

[Title of District Court and Cause.]

ORDER

This case having been tried, argued, briefed and submitted for decision; and thereafter the court of its own motion having ordered the cause re-opened for the introduction of further and additional testimony with respect to the earnings of the deceased husband, Peter Fotopulos;

Now, therefore, the court being fully advised in the premises, finds:

(1) That on the 23rd day of December, 1946, on Van Ness Avenue near Bush Street, the defendant United States of [11] America, acting by and through its agents and servants, was negligent and the said negligence proximately caused and contributed to the injuries sustained by the said Peter Fotopulos which ultimately resulted in his death and that said death was proximately caused by the injuries sustained as aforesaid;

(2) That the deceased left surviving him his wife, together with two surviving children, Thomas Fotopulos and Joan Fotopulos, aged ten and nine years, respectively, plaintiffs herein, and that the wife herein and said children were and are entirely dependent upon deceased for their support and maintenance;

(3) That plaintiffs are entitled to the sum of \$50,000 as and for compensatory damages.

Wherefore, It Is Ordered that judgment be entered in favor of plaintiffs in the amount of \$50,000; plaintiffs to prepare findings of fact and conclusions of law.

Dated: April 9th, 1948.

GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed Apr. 9, 1948. [12]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The complaint herein was filed under the provisions and in accordance with the "Federal Tort Claims Act" of the United States of America of August 2, 1946, and this cause came on regularly for trial on the 4th day of December, 1947, before the Court without a jury, a jury not being allowed under the terms of said act.

Carroll S. Bucher, Esq., appeared as attorney for the plaintiffs and Frank J. Hennessy, Esq., United States Attorney, and Rudolph J. Scholz, Esq., Assistant United States Attorney, appeared as attorneys for the defendant.

FINDINGS OF FACT

From the evidence introduced the Court finds the facts as follows, to-wit:

1. That on the 23rd day of December, 1946, Peter Fotopulos was of the age of 49 years and his life expectancy was [13] then 23.36 years.

2. That on said day he was the husband of Diamond Fotopulos, one of the plaintiffs herein and was the father of Thomas F. Fotopulos and Joan F. Fotopulos, minors, who are also plaintiffs herein.

3. That on said day Diamond Fotopulos was of the age of 29 years, Thomas F. Fotopulos was of the age of 10 years and Joan F. Fotopulos was of the age of 9 years.

4. That the said Peter Fotopulos and Diamond Fotopulos were married on November 24, 1935, and

on the 23rd day of December, 1946, the said Peter Fotopulos was the sole support of his wife, Diamond Fotopulos, and his children, Peter F. Fotopulos and Joan F. Fotopulos, plaintiffs herein.

5. That on December 23, 1946, Van Ness Avenue and Bush Street were and are public streets and thoroughfares in the City and County of San Francisco, State of California.

6. That the City and County of San Francisco, State of California, is located in and is a part of the Northern District of California, Southern Division, and is within the jurisdiction of this United States District Court.

7. That the said Diamond Fotopulos was duly and legally appointed guardian ad litem of the said Peter F. Fotopulos and Joan F. Fotopulos, minors, plaintiffs herein and all of the plaintiffs were, on December 23, 1946, and now are residents of San Mateo County, California, which county is within the jurisdiction of this court.

8. That on the 23rd day of December, 1946, one Charles A. Bailey was an employee of a federal agency of the United States of America, defendant herein, to-wit: a soldier of the Army of the United States.

9. That on the 23rd day of December, 1946, at about the hour of 9:30 a.m. of said day, the said Peter Fotopulos was driving [14] a Dodge automobile light truck in a northerly direction on Van Ness Avenue near Bush Street in said City and County of San Francisco, State of California, and at the same time and about the same place the

said Charles A. Bailey was driving a truck belonging to the Ft. Mason Post Motor Pool, United States Army, which was then an agency of the United States of America, defendant herein; that at said time and place the said Charles A. Bailey was acting in the course and scope of his employment as an employee of the said United States Army, the agency of the defendant herein.

10. That on the said 23rd day of December, 1946, as aforesaid, the said Charles A. Bailey, while acting in the course and scope of his employment as an employee of the said United States Army, did carelessly, negligently and recklessly drive and operate the said Army truck in a northerly direction on Van Ness Avenue so as to cause the said army truck to collide with the said Dodge truck then being driven and operated by the said Peter Fotopulos.

11. That as a proximate result of the said collision caused by the negligence, carelessness and recklessness of the said Charles A. Bailey, while acting in the scope and course of his employment, the said Peter Fotopulos sustained personal injuries consisting of a blow on the upper part of his abdomen, the force of which being transmitted inwardly caused a thrombosis in one of the mesenteric blood vessels. This interruption in the circulation to a portion of the transverse colon then proceeded to a necrosis of a portion of the wall of the transverse colon resulting in a perforation of the latter; that the said Peter Fotopulos was operated on January 8, 1947, by Russell Ryan,

M.D., and died on January 10, 1947, of a generalized peritonitis and a perforated transverse colon; that the said generalized peritonitis and ruptured colon were the sole and proximate result of the injuries sustained by him on December 23, 1946, and the sole and proximate result [15] of the negligence, carelessness and recklessness of the said Charles A. Bailey, while acting in the scope and course of his employment, as aforesaid.

12. That during the period between the accident on December 23, 1946, and the death of Peter Fotopulos on January 10, 1947, he, the said Peter Fotopulos, continually complained to his wife and family of abdominal pains and consulted a physician on January 3, 1947, who prescribed medicine for him.

13. That up to the time of the occurrence of the said collision and injury and continuously for an extended period prior thereto, the said Peter Fotopulos had been sound of body, physically robust and in good health.

14. That the said Peter Fotopulos was not careless or negligent in or about the accident aforesaid and did not operate the said Dodge truck in a careless or negligent manner and that no negligence or carelessness and no act or deed of the said Peter Fotopulos in any manner was the proximate cause of or proximately or in any manner contributed to the said accident.

15. That at the time of the aforesaid accident Peter Fotopulos was the sole owner and manager of a business known as the "P. F. Casing Co.,"

and for a number of years prior thereto had been engaged in the active operation and development of said business.

16. That the net earnings of the said Peter Fotopulos from the said business for the year 1943 amounted to \$7,552.55; for the year 1944 amounted to \$12,262.56; for the year 1945 amounted to \$15,195.92 and for the year 1946 amounted to \$18,316.08.

17. That after the death of the said Peter Fotopulos, his widow, a plaintiff herein, attempted to continue the operation of the said business but that the personal service contributed by the decedent to the said business during his lifetime proved to be an essential asset to the said business and following his death [16] it became impossible for his widow to operate the same except at a loss and she then terminated the same and received no value therefor.

18. That the said Diamond Fotopulos, plaintiff herein, has no property or income separate and apart from her community interests and she and her two children, plaintiffs herein depended solely upon Peter Fotopulos for their support.

19. That all of the allegations contained in the plaintiffs' complaint herein are sustained by competent evidence and are true and each and every one of the denials and averments contained in the answer of the defendant are unsupported by the evidence and are untrue.

20. That plaintiffs were damaged by reason of the accident to and the death of Peter Fotopulos

and by reason of the negligence of the defendant and its servant and employee Charles A. Bailey in the sum of \$50,000.00.

CONCLUSIONS OF LAW

From the foregoing facts the Court concludes:

That plaintiffs are entitled to judgment against the defendant for the amount of \$50,000.00 with interest at the rate of 4% per annum from the date of judgment until paid, and for their costs herein expended.

Let judgment be entered accordingly.

Done in open Court this 25th day of May, 1948.

GEORGE B. HARRIS,

Judge of the U. S. District
Court.

[Endorsed]: Lodged 5/17/48. Filed May 25,
1948. [17]

In the District Court of the United States for the
Northern District of California, Southern Division

No. 26833-H

DIAMOND FOTOPULOS and THOMAS FOTOPULOS and JOAN F. FOTOPULOS, Minors, by and Through Their Guardian ad litem,
DIAMOND FOTOPULOS,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause came on regularly for trial before the Court sitting without a jury on the 4th day of December, 1947, Carroll S. Bucher, Esq., appeared for the plaintiffs and Frank J. Hennessy, Esq., United States Attorney, and Rudolph J. Scholz, Esq., Assistant United States Attorney, appeared as attorneys for the defendant, and the Court having heard the testimony, and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed:

1. That plaintiffs have judgment against the defendant in the sum of \$50,000.00 with interest

thereon at the rate of 4% [18] per annum from date hereof until paid.

2. That plaintiffs have judgment against the defendant for their costs herein taxed at \$27.00.

Dated this 25th day of May, 1948.

GEORGE B. HARRIS,
Judge of the U. S. District
Court.

[Endorsed]: Entered in Civil Docket May 25, 1948. Filed May 25, 1948. [19]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Plaintiffs in the above-entitled action and to Carroll S. Bucher, Attorney for the Plaintiffs:

You and each of you will please take notice that the defendant in the above-entitled action hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment given, made and entered in the above-entitled action and from the whole thereof, which judgment was entered and dated May 26, 1948.

Dated: July 21, 1948.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed July 22, 1948. [20]

[Title of District Court and Cause.]

PRAECIPE FOR PREPARATION OF
RECORD ON APPEAL

To the Clerk of the above-entitled Court:

Defendant having filed herein its Notice of Appeal in the above-entitled action, you are hereby requested to prepare record on appeal consisting of the following:

1. Complaint.
2. Answer.
5. Transcript of Proceedings in the District Court.
6. Medical Reports Offered by the Defendant.
7. Trial Court's Opinion.
8. Findings of Fact and Conclusions of Law.
9. Judgment.
10. Appellant's Statement of Points.
11. Notice of Appeal.
12. Clerk's Certificate of Transcript and Entry of Lodging Transcript with Clerk of Appellate Court.

FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed Aug. 20, 1948. [21]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

The Trial Court erred.

1. In finding the defendant United States of America negligent in the operation of its vehicle;
2. In finding Peter Fotopulos was not guilty of contributory negligence;
3. In finding that his death was caused by the collision;
4. In excluding evidence of other accidents or sickness;
5. In not finding how much of the disability resulted from the injury and what disability resulted from other causes;
6. In awarding excessive damages;
7. In that there is insufficiency of evidence to justify the trial Court's decision.

Dated: August 20th, 1948.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed Aug. 20, 1948. [22]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and

including October 9, 1948, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: August 26, 1948.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed] Filed Aug. 26, 1948. [23]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefore, it is hereby Ordered that the Appellant herein may have to and including October 19, 1948, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: October 8, 1948.

GEORGE B. HARRIS,

United States District Judge.

[Endorsed]: Filed Oct. 8, 1948. [24]

District Court of the United States,
Northern District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 24 pages, numbered from 1 to 24, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of Diamond Fotopulos, et al., Plaintiffs, vs. The United States of America, Defendant, No. 26833-H, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$6.00 and that the said amount has been charged against the United States of America.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 16th day of October, A.D. 1948.

[Seal]

C. W. CALBREATH,
Clerk.[25]

In the Southern Division of the United States District Court for the Northern District of California

Before: Hon. George B. Harris, Judge.

No. 26833-H

DIAMOND FOTOPULOS, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT

Thursday, December 4, 1947

Friday, December 5, 1947

Appearances: For Plaintiffs: Carroll S. Bucher, Esq. For the United States: Rudolph J. Scholz, Esq., Assistant United States Attorney. [1*]

Thursday, December 4, 1947, 10:00 A.M.

The Clerk: Case of Fotopulos vs. U. S. for trial.

Mr. Bucher: This is a case involving the death of one Peter Fotopulos.

The Court: What is the gentleman's name?

Mr. Bucher: Peter Fotopulos. The suit is brought by his widow, Diamond Fotopulos, in her own behalf, and as guardian ad litem of their two minor children. The testimony, we believe, will show——

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

The Court: Has a jury been waived?

Mr. Bucher: The jury is not allowed under Federal Court Case Act,—

The Court: Yes.

Mr. Bucher: Shall I proceed?

The Court: Yes, you may.

Mr. Bucher: The evidence, we believe, will show that on December 23, 1946, a little less than a year ago, the deceased was driving his light Dodge pick-up truck north on Van Ness Avenue, and as he approached the intersection of Van Ness and Bush Streets, going north, the red stop light was against him, and he was in the inner lane, or next to the street car tracks, there being two driving lanes in addition to the street car tracks on Van Ness. Another truck was ahead of him in the same lane of traffic, which had already stopped for the red [2] light. The deceased stopped his truck behind the truck ahead of him, and after he came to a stop, an Army truck, driving in the same direction and following him, collided with the rear end of his Dodge truck, forcing him into the rear end of the truck ahead of him, damaging both the front and rear of the Dodge truck, and causing injuries which resulted in his death. The accident occurred, as I say, on December 23rd.

The evidence will show that he entered the St. Francis Hospital on January 7, a matter of two weeks later, that he was operated on January 8th by Dr. Russell Ryan and died on January 10, 1947. A stipulation has been entered into between counsel, which I shall file, admitting these facts: that at

the time of the accident, Peter Fotopulos was driving the Dodge pick-up truck involved in the accident, that he was then of the age of 49 years, and that his life expectancy on December 23, the day of the accident, was 23.36 years; that he was married to the plaintiff and guardian ad litem on November 24, 1935; that he left surviving him his widow, aged 29 years, and two children, Thomas F. Fotopulos, aged 10 years, and Joanne Fotopulos, aged 9 years; that he died on January 10, 1947; that at the time of the accident he was the sole owner of the business known as the P. F. Casing Company; that the net earnings of Peter Fotopulos upon which he paid Federal income taxes were as follows: For the year 1943, \$7872.55. Now the year 1944 is omitted from this, because we haven't that [3] record. But for the year 1945, his earnings were \$15,195.92. And for the year 1946, \$18,574.76. Further, that the plaintiff, who is the widow of Peter Fotopulos, has no property or income separate and apart from her community interest.

May I file the stipulation at this time?

The Court: Yes.

Mr. Bucher: That, if the Court please——

The Court: Is that stipulation signed by the Government's counsel?

Mr. Scholz: Yes, your Honor, it is signed by myself on behalf of Frank Hennessy. If Your Honor please, I would like to make just a brief opening statement. May I use your map for the purpose of this?

Mr. Bucher: Yes.

Mr. Scholz: It will be offered in evidence later?

Mr. Bucher: Yes, it will be. We prepared a map of the intersection.

(Map was then fastened to the blackboard.)

Mr. Scholz: If your Honor please, the Government's evidence will show that the Chevrolet light truck, 6 x 6, had stopped at Sutter Street, back here (indicating). It is not shown on this diagram. Then it proceeded approximately 15 miles an hour down Van Ness Avenue, along the inner lane of the east side of Van Ness Avenue, proceeding down here (indicating). [4] That Fotopulos' pick-up truck had been going along the outer lane, and that as it approached the safety zone indicated here (indicating), the Dodge pick-up sharply turned in front of the Army vehicle; that another vehicle had stopped because of the light, red light, here, and then went on, and nobody ever saw it any more. So that's out of the picture. That immediately upon the driver of the Army vehicle seeing this truck of Mr. Fotopulos cut in, applied his brakes in an attempt to slow, to stop the car to avoid hitting it. He succeeded, except that it caused a slight blow on the left rear sill of the Fotopulos car. In other words, the right front bumper of the Army vehicle hit the left rear of the Fotopulos car. It was a slight blow, and there was practically no damage done to either car because of the impact. The only damage to the Government vehicle was a scratch on the right front bumper, or more of a displacing of a little paint. The dam-

age to the Fotopulos car was very slight, although a bill will be presented showing a great deal of damage; but we will show it wasn't caused by this impact.

Therefore, the evidence of the Government will show that the damages, if any in this case, were caused by the negligence and the sole negligence of Mr. Fotopulos in cutting in from his lane in front of the Army vehicle, without taking proper precautions, and without safety. As Mr. Bucher stated, the accident happened on December 23, 1946, and that following an [5] operation, Mr. Fotopulos died on January 10, 1947. Whether or not his death could have been caused by that accident, I say is problematical. I assume that the plaintiff will produce some medical testimony to show that in the opinion of the medical expert, that it could have been caused by that. We will produce testimony to show that it probably wasn't, but there is a possibility. However, we do want to emphasize that the death was not caused—I mean that the impact was a slight impact, and not one that caused any particular damage at all to either the personnel or to the vehicles involved.

Mr. Bucher: May I proceed?

The Court: Yes, Proceed.

Mr. Bucher: May it please the court, we desire the privilege of calling out of order Dr. Russell Ryan, inasmuch as he has hospital cases.

The Court: Very well.

Mr. Bucher: Dr. Ryan, please.

RUSSELL C. RYAN,

called as a witness on behalf of plaintiffs; sworn.

The Clerk: Will you state your name to the court?

A. Russell C. Ryan.

Direct Examination

By Mr. Bucher:

Q. Dr. Ryan, are you a practicing surgeon in San Francisco? [6] A. I am.

Q. How long have you been practicing surgery?

A. I have been in the practice of my profession 36 years, and I have specialized in surgery since 1921, when I was made a Fellow in the College of Surgeons.

Mr. Scholz: If you wish, we will stipulate to his qualifications.

Mr. Bucher: The qualifications?

Mr. Scholz: Yes.

Mr. Bucher: Very well, thanks.

Q. Dr. Ryan, were you called upon to treat a man by the name of Peter Fotopulos on or about the 7th of January of this year?

A. Yes, I was, and my associate initially responded.

Q. Yes, and sent the patient into the hospital?

A. Yes.

Q. When did you first see the patient?

A. January 7, 1947.

Q. Where?

A. At the St. Francis Hospital.

Q. You made an examination? A. I did.

(Testimony of Russell C. Ryan.)

Q. Did you diagnose his condition from the examination you made at that time?

A. I made a diagnosis of the surgical abdomen.

Q. Did he give you a history?

A. He did. [7]

Q. What was the history he gave to you?

A. May I consult my notes?

Q. Yes.

A. (Consulting notes): He stated that approximately 9:30 a.m. on the morning of December 23rd, 1946——

Mr. Scholz: May I interrupt, your Honor, to ask one question?

The Court: Yes.

Q. (By Mr. Scholz): Were those notes made at the time or subsequently?

A. Well, very shortly afterward; I didn't carry my——

Q. Within a few hours?

A. Yes, well just afterwards. Well, I had some of the data and transferred that from my hospital to my office record, but this is my office record which I accumulated.

Q. That is a copy of your office record?

A. It is not a copy, it is my office record. It is a history of the case as I take it.

Q. That, then, is made in the ordinary course and approximately how long after the consultation?

A. Well, I would say just a very few days, when the case was completed. I can't recall how many

(Testimony of Russell C. Ryan.)

days afterwards, but in the course of the practice of medicine, you don't write your history every day, but at the end of the week you have all your history completed for the next week, so far as you are [8] able, and all I can say now is that as to the best of my recollection this was made a very few days afterward, but from the records that I took at that time, at the hospital, and I transferred those to my office records, which I have here.

Q. (By Mr. Bucher): All right, proceed, Doctor.

A. He stated that at approximately 9:30 a.m. he was driving a truck and he stopped at a "Stop" sign, and while stopped he was struck from the rear with some force, and this caused him to strike his upper abdomen on the steering unit of his truck. He felt some pain, which he described as considerable at the time, but was able to ambulate. The symptoms gradually became worse, and he was seen by another physician at his home, and he was seen once by that doctor, and he continued to get worse. Then after a few days, he sent for me and my associate, Dr. Musser, was sent down, and Dr. Musser found that he had a general peritonitis, a surgical abdomen, and immediately sent him into the hospital.

The Court: How many days elapsed, Counsel?

The Witness: Your Honor, that was——

The Court: Three days?

The Witness: No, it was several days. That was the 7th of January, and he had been injured on

(Testimony of Russell C. Ryan.)

the 23rd of December. During that time he gave a history of gradually getting worse. I wanted to immediately operate on him, but he refused. And the following day his condition was very much worse, and he [9] finally consented, and I considered several things—the possibility of a ruptured appendix or a ruptured gall bladder. I did not make a definite diagnosis, except a surgical abdomen, and then—do you wish me to recite my finding, at the operation?

Q. Yes, will you proceed? You operated, did you?

A. I operated.

Q. On the 8th of January?

A. That is correct.

Q. Now, will you proceed and explain the operation, and what you found?

A. Well, I operated, I opened the abdomen, I found a lot of free fluid, and his appendix looked infected, and I just routinely took that out in preparation of attacking a large mass which I found in the upper abdomen, and there was a hole in the transverse colon, or the transverse part of the large bowel, a necrotic hole which had been walled off by the omentum, as we call it, which is a large apron of fat which nature uses to wall off inflammatory conditions around the appendix, or in any part of the abdomen. There was a quantity of fecal matter and pus in the abdominal cavity. And I then repaired the opening in the bowel as best I could, and then I brought the first part of the large bowel to the surface, and I made an anti-

(Testimony of Russell C. Ryan.)

ficial rectum, if you please, so that gas and intestinal contents would not cause pressure on this area [10] that I had repaired in the bowel—hoping that it might heal. But the patient passed away.

Q. He died, did he, on the 10th—two days later?

A. That is correct.

Q. Now, in your opinion, Doctor, was death the result of the condition in which you found his bowel to be at the time you operated?

A. Yes, that was the cause of death.

Q. Yes. Did you find a thrombosis, or a clotting of the blood vessel?

A. I found a picture, as I have the pathological report here, which led me to the very definite conclusion that this man had suffered a thrombosis or a clotting in one of the blood vessels, the superior mesenteric, which supplies that part of the colon, and there was a gradual shutting off of blood supply with a necrosis of the bowel, and a final perforation of the bowel, the perforation of this necrotic area in the bowel wall. That is what caused his death.

Q. And the perforation of the bowel was the condition that allowed the fecal matter to exude into the abdominal cavity?

A. In to the abdominal cavity. And I have the report, pathological report, here of the specimen that was removed and examined in the laboratory subsequently.

Q. Yes. Now, Doctor, I understand it is your opinion that if there was an injury, the injury then

(Testimony of Russell C. Ryan.)

was to the blood vessel, [11] itself, or the superior mesenteric artery, is that true?

A. That is correct, that is a well-recognized entity.

Q. It is? A. It is.

Q. Then if I am not mistaken, the failure of the artery to supply the transverse colon with blood caused a necrosis to form and later an opening in the colon? A. That is correct.

Q. Is that correct?

A. It depends on the size of the branch involved, and it depends on the amount of collateral circulation, but if that is insufficient, there is a gradual failure of nutrition of the intestinal wall, with a final necrosis.

Q. In other words, then, after the injury, a small clot may be formed, which during later days may enlarge—the clot, itself, may enlarge?

A. Build up.

Q. Until finally it shuts off the blood supply in that artery completely, is that right?

A. That is correct.

Q. Doctor, having in mind the history which the patient gave you, of a trauma on the 23rd of December, what is your opinion as to whether or not the trauma was the proximate cause of the condition which you found at his death?

Mr. Scholz: Just a minute, I think that is objectionable, [12] if he is going to give his opinion purely from the history that was given to him by Mr. Fotopulos, don't you think? It is my sug-

(Testimony of Russell C. Ryan.)

gestion to the court that if he has read the pathological, neurological, and all these other records, that based upon that, I don't think it should be based on only parts.

Mr. Bucher: I didn't intend to, I will amend my question.

Q. Not only the history which he gave you, but upon the reports of the pathologist and the reports of the autopsy surgeon, what is your conclusion?

A. My conclusion is that this patient, as he stated in his history, received a blow in the abdomen, that he had a subsequent clot form in one of the nutrient vessels of the wall of the colon, he had a necrosis following that, and died as a result.

Q. In other words, then, is it your opinion from all of the facts you know about this case, that the original trauma on the 23rd of December was the proximate cause of the condition which you found on operation, and of his death?

A. Very definitely, yes.

Q. You have no doubt about it in your mind?

A. Not in my mind, there isn't any doubt.

Q. Does the extended period between the 23rd of December and the 7th of January, when you were first called in, in any manner, in your opinion, negative your conclusion?

A. No, because the process which was initiated at the time of [13] the injury progressed to the point of where the bowel wall finally broke down

(Testimony of Russell C. Ryan.)

and the condition as I found it at operation was the final and terminal result. But during that time, the patient had symptoms, and this condition was progressing to the point where I found it.

Q. Doctor, have you had occasion to recently read an article by Merl B. Crown, of the Mount Zion Hospital, New York City, on the traumatic origin of abdominal diseases within this year?

A. Yes, that was in the Journal of Gastroenterology, and the doctor has a 5 or 7-page article. He is also connected with the New York Post Graduate School, where I did some work, and these conditions are relatively so frequent that he has written quite an article on them, and that is a matter of record, and that article focuses on this condition.

Q. On the traumatic cause?

A. That is right.

Mr. Bucher: That is all, if the Court please.

Cross-Examination

By Mr. Scholz:

Q. Dr. Ryan, in your direct testimony, if I state it correctly, I wrote it down, but sometimes I don't write too correctly, your history was that Mr. Fotopulos gave you, that he struck his upper abdomen by the steering wheel?

A. He told me by the steering wheel, yes.

Q. Now, the pathology, you read the pathology report, did you not?

A. Yes, I have it here, as a matter of fact. [14]

Q. And the pathology shows that it was in the lower quadrant, does it not? In other words, if

(Testimony of Russell C. Ryan.)

he was struck by the steering gear, it would be in the upper part of his belly—or—I don't know what your technical name would be, it would be up here (indicating), the upper part right below the breastbone, the chest?

A. That is where, presumably, he was struck, from what he said.

Q. But now the pathology was down in the lower quarter? A. Oh, no.

Q. The pathology was not down there?

A. No; I mean, I read the report, but I don't recall what it said as to location. But it said—

“This specimen consists of an irregular mass of hemorrhagic, fibro-fatty tissue 9.5 x 4.0 cm. in size and an appendix 6.0 x 0.5 cm. in size. The mass of fat contains a large area of hemorrhage and necrosis with a saft, shaggy lining, and measuring approximately 5.5 x 3.5 centimeters. There are additional adjacent patches of hemorrhage in this tissue. There are no evidences of tumor. One area of the specimen bears a fairly wide patch of fibrinous exudate on the surface. The appendix . . .”

Now, this is another specimen, you see. I took the appendix out.

“. . . shows much fibrosis surrounding a pinpoint [15] lumen with a small amount of fecal matter in the more widely patent lumen of the proximal half of the organ. There is no evidence of active inflammation grossly.” That is referring to the appendix.

(Testimony of Russell C. Ryan.)

“Microscopic diagnosis: Acute peritonitis with multiple abscesses, hemorrhage, and organization in fat. Healed appendix.”

And then below:

“Note: There is no evidence of tumor of specific infection.”

Nothing is mentioned there of any location, and this mass that I took out and which has been reported on, I took out of the upper abdomen.

Q. Well, then, from your knowledge, you would say that the complaint was vested in the lower quadrant of the abdomen?

A. Well, his complaint, he had a general peritonitis—his complaint was all over.

Q. I don't mean his complaint, but I mean that the pathology was not vested in the lower quadrant of the abdomen (indicating)?

A. Well, if I understand correctly, you mean when I saw the man?

A. No, I mean from the pathological report you just read now, would you say that that was, that the pathology was concerned with the upper part of the abdomen, or the lower quadrant of the abdomen? [16]

A. Well, the pathology, the specimen as removed from the abdomen concerned the upper abdomen, but of course the whole abdomen was a general peritonitis when I went in. I didn't take any specimen—you see, the peritoneum is the link of the abdominal cavity, and but that mass that I took out came from his upper abdomen.

(Testimony of Russell C. Ryan.)

Q. Well, the injury, you say, from your knowledge of the case, from reading the microscopic report, the pathological report, and the neuroscipic report, that the injuries in the lower part of the lower quadrant of the abdomen?

A. No, I would not. This is a report on the mass that I took from his upper abdomen.

Q. Dr. Ryan, you treated Mr. Fotopulos before this accident, did you not?

A. I have no record, but I have a faint recollection; just some minor thing, something like a cold. I don't recall anything of a serious type at all.

Q. Did you know the condition of his previous health prior to the time that you saw him on January 8?

A. Not immediately, no.

Q. He was about 5 feet 2, was he not, and weighed about 189 pounds?

A. I can't—I know that he was a short and rather a chunky man, yes.

Q. Wouldn't you say he was obese? [17]

A. No, I wouldn't say he was obese, but he was overweight, he was over average weight.

Q. Now, Doctor, in your opinion as an expert witness, could not this death have been caused by any other thing beside a blow on the abdomen which it was reported he received on December 23, 1946?

A. Well, if I may digress a moment to make my answer plain, from what I found and what I saw, I would say no. The thrombosis of the mesenteric vessels has occurred in other things—and

(Testimony of Russell C. Ryan.)

I might take an example, hemorrhage in the brain. We know that many people go to bed at night and are apparently in good health and that they suffer a stroke of paralysis right in bed. They have a hemorrhage in the brain. Or a thrombosis. Or they might be out playing golf, but on the other hand, if you have a man who is in average good health and he is struck on the head and he has a hemorrhage of the brain, and if you find no other cause for it, you are going to ascribe that hemorrhage in the brain to the blow on the head, if there are no other causes present as far as you can see. And so it is in this case; I found no other definite reason for this man having the necrosis. He gave a definite history of a blow, he said he had pain afterward, and he had a gradual developing picture from the time of that injury. He had no diverticulum or diverticulitis, which sometimes produces a picture—he had no other signs in the abdomen that I found that could explain it, and we find in the laboratory report, the pathological report, the report by the pathologist, of multiple hemorrhage, which were somewhat organized, showing that they were of some few days, several days, standing; and the picture as I look at it, was very definitely, could be very definitely, ascribed to that injury.

Q. Doctor, as I listen to your testimony, I think your [18] reasoning is from one event to the next event and soon, is that right, and then you come to your conclusion?

A. Well, as you go along in a case from one

(Testimony of Russell C. Ryan.)

point to another, I think that is the way to do.

Q. But that doesn't always follow, that merely because the events precede each other that the cause and effect precede each other, isn't that correct?

A. Well, I think that is a pretty safe rule to follow, that events do follow one another in orderly sequence in a case, and that is why we, in surgery, lay so much stress on a history.

Q. And then you evolve from that there, that the cause of death was the effect of the blow on his abdomen on December 23, is that correct?

A. Yes, and I believe this article that was just brought to my notice here, that I had read, this is quite frequent; this man has written a recent article on it.

Q. Well, Doctor, I am not familiar with the article. I have been trying to keep up with the medical testimony—so I can't ask you on something I don't know anything about. Doctor, he stated that he was struck, or that he had a blow on the upper abdomen on December 23. Did he state what kind of blow that was, whether it was a hard or a slight blow?

A. Well, I will read just as I put it down at the time.

Q. Well, no, what you put down, Doctor, was simply that he was struck in the abdomen, but it did not state whether it was a [19] heavy blow or a slight blow, if I recollect.

A. Well, he said he felt some pain, parenthetically.

(Testimony of Russell C. Ryan.)

Q. Well, I am talking about the blow; that is, confine yourself to the point there.

A. Well, I can only say that he had a blow which gave him considerable pain. I couldn't say as to the force of the blow.

Q. You don't know what the force was?

A. I don't think anybody could. I would have to take the man's statement.

Q. Well, Doctor, as a matter of fact, there was no visible evidence of any blow at all?

A. No, and that is very frequently the case, as this article we referred to will show you; serious abdominal evidence might be found without any external evidence of trauma. That is not unusual at all.

Q. And from your preliminary examination, you could not find any symptoms of internal or external injury, could you?

A. Oh, I found, when I first saw the man, a very widespread evidence of internal damage. The man had general peritonitis, his abdomen was as rigid as this floor (indicating), he had a surgical abdomen in a very advanced stage.

Q. Did you find any evidence of external or any symptoms of external injury?

A. No, just his rigid abdomen, and as I say, I haven't it in my notes, but I recall that he did give a history of passing [20] some blood from the bowels. I think the hospital records, if I am not mistaken, will show that.

Q. There was a hole in the bowel?

A. There was a very big one, yes.

(Testimony of Russell C. Ryan.)

Q. And did you not testify before the coroner's inquest that you found quite a hole in the bowel?

A. Yes.

Q. And then they asked you, was it possible that hole was caused by the trauma on December 23, and your answer was, "Well, if it was due to the mesenteric. . . ." (hesitating). A. "thrombosis."

Q. It is possible that it was?

A. That is right. I don't recall, but I know that would be my testimony.

Q. Doctor, if the evidence develops that there is merely a slight blow on the abdomen, of the upper part of the abdomen, you would still adhere to your opinion that his death was caused by that slight blow on the abdomen on December 23?

A. Yes, and may I give an explanation for my answer?

Q. If you wish.

A. I would like to. Even a blow that would be relatively slight, there is a case by Dr. Nassinger and Dr. Howard Fleming on record—I believe there are only seven cases like it—like a carpenter patient of mine; I was finally called in to see him. He had been working on a ladder and a man working above [21] him——

Mr. Scholz: I am sorry. Does Your Honor want to listen to this?

The Court: Well, you consented to the illustration.

A. (Continuing): There was a carpenter work-

(Testimony of Russell C. Ryan.)

ing just three rungs above him, and something slipped and hit this man a glancing blow on the scalp, apparently a very slight injury. That man went on working and finally developed symptoms which, two or three other doctors described as influenza and sleeping sickness, and it got worse and worse, and about six months later, I was called in and I found it was entirely out of my field, and I called Dr. Howard Fleming. He was with Dr. Nassinger at that time; they operated on the man and found at the time of that operation that the man's brain was not much larger than three hen's eggs, and there was in his skull this massive hemorrhage which had, over a period of several months, compressed his brain, and they put that case on record as being due to that relatively slight blow with the hammer. But that hemorrhage had lasted several months, and he had an atrophied brain, and I would say that this thing would come from what you would at the time consider an insignificant blow, and it could develop into a very significant picture.

Q. Well, then, Doctor, as I understand your testimony, there is nothing that could have happened between the days of this so-called accident on December 23 and the date he died or that [22] you operated, the date he died, January 10, that could have caused his death other than this blow, the magnitude of which either you or I don't know?

A. Oh, I wouldn't say that, no; I didn't get

(Testimony of Russell C. Ryan.)

any history of anything else happening and what I found was very definitely explained by what had happened, but I wouldn't say that nothing else could have happened to him in the meantime, but I found no evidence of anything else happening to him.

Q. Well, then, I misunderstood your direct testimony; I asked you that question, if there was any other causes brought forth that could have caused death except the light blow on the abdomen, and I understood you said no. Now, as I understand you now, it could have happened, but you had no evidence?

A. Well, I misunderstood you, I am sorry. I understood that you asked me if anything else could have happened to him. Well, I suppose something else could have happened to him, but I didn't find any evidence of anything else happening to him, and I found a very complete picture of what did happen to him, in my opinion.

Q. Do you know whether or not he worked from the time he was injured up to the time he saw you on January 7?

A. No, I don't know how long he did work. I know that he carried on, after he left the point of injury at the time of injury. I understand he drove his truck away. Then I don't know how many days later, or when he did it, but shortly afterward he [23] called in a doctor in South City, and he said he saw that doctor once and that the doctor gave him some medicine. He said he was no better and

(Testimony of Russell C. Ryan.)

then he went along a few days by himself, getting worse, and then he finally sent for help.

Q. And that was Dr. Wirthheim, do you know?

A. Yes, I met the doctor the other day.

Q. The gentleman here in the courtroom, Doctor?

A. Yes, that is right.

Q. And then you don't know what kind of work he was doing prior to or after he saw you?

A. No, I didn't go into that.

Mr. Scholz: That's all, Doctor.

Mr. Bucher: I have no further questions. May the doctor be excused?

Mr. Scholz: Yes.

If Your Honor please, with the consent of the Court and counsel, I have some doctors coming, one of which is here now, and they are rather busy. If it would be possible that I could call him out of order and have all the medical testimony given now?

Mr. Bucher: No objection.

The Court: All right. Are you calling the doctor as your witness, Mr. Scholz?

Mr. Scholz: This is my witness, Your Honor.

MORRIS WIRTHHEIM

called for the United States, sworn.

The Clerk: Will you state your name to the Court?

A. Dr. Morris Wirthheim.

The Court: Proceed.

(Testimony of Morris Wirthheim.)

Direct Examination

By Mr. Scholz:

Q. Doctor, you are a practicing physician and surgeon here in the State of California, duly licensed to practice as such?

A. Yes, I am—since 1940.

Q. And——

Mr. Scholz: Will you stipulate to his qualifications, or do you want me to go into his history?

Mr. Bucher: I will not stipulate to his qualifications as an expert in general surgery.

The Court: Ask the doctor his background.

Q. (By Mr. Scholz): What is your background, Doctor?

A. I did general practice and surgical work since 1912. I was physician and surgeon in the First War and practiced since 1940 in this country.

Q. Did you know Peter Fotopulos during his lifetime?

A. I have treated him before. He was my patient before this time.

Q. And did he come to see you after December 23, 1947?

A. I have seen him only once, January 3, 1947.

Q. When?

A. Third of January. Yes, the only time I have seen him.

Q. And at that time what was the occasion of his visit to you?

A. He came to my office, I think, on the 4th and said I should come over to see him, and then

(Testimony of Morris Wirthheim.)

he came to my office, as far as I remember; he phoned first, then when he came to my office, he told me, said he had an accident on the 23rd of December, and that he felt some kind of discomfort in his upper part of his stomach. I examined him. He told me about the kind of accident that he was struck from behind, he was shaken. I can't tell if he told me just against the steering wheel—anyhow, he had an accident, with the feeling that he got an injury of the stomach. He had no symptoms of vomiting or peritoneal, no external injury, no findings of an internal injury what could make possible a rupture or a severe injury of the bowel. He had no fever. I wrote down that he had a blood pressure of 148-98. That was about according to his age of 49 years. His urine was normal, his weight without overcoat, 189 pounds. I advised him only to rest and diet. There was no reason for suspicion of a severe injury what could need hospitalization or surgery. Then I didn't hear anything more about the case.

Q. Doctor, have you read the pathological and the microscopic and the neuroscopic?

A. The post mortem report. [26]

Q. Is that right? Have you read the report in this case?

A. Yes, I read that.

Q. Now, do you believe from that report that this injury could have been caused by a slight blow on the abdomen on December 23 of 1946?

Mr. Bucher: If the Court please, we object to the question on the ground that no foundation has

(Testimony of Morris Wirthheim.)

been properly laid qualifying this man as an expert in surgery.

The Court: Sustained.

Q. (By Mr. Scholz): Doctor, what, in your opinion—have you operated, have you performed the duties of a surgeon for a period of time?

A. I did surgery.

Q. How many years?

A. Many years, since 1912 to about 1925. Then I did it only occasionally.

Q. Have you done it very much the last few years? A. Not the last years.

Q. Not the last years?

A. No, not during the last years.

Q. I see.

Mr. Scholz: Does Your Honor feel that he is not qualified on that?

The Court: Well, where was he educated?

A. Originally in Germany, and then I studied again in California. [27]

Q. What school in Germany did you graduate from?

A. I graduated from Kiel, 1912, and then I graduated again in 1940 from the University of California.

Q. 1940? A. '40.

Q. Are you a member of any of the societies?

A. Yes, County Medical Association, San Mateo, and the County Medical Association of San Francisco.

Q. Are you a member of the American College of Surgeons?

(Testimony of Morris Wirthheim.)

A. No, I am no specialist, I am a general practitioner.

Q. Have you examined the pathological findings?

A. I read the report about it.

Q. Have you read all the reports on the subject?

A. I think that was a complete report, which I got last week.

Mr. Scholz: Yes, Your Honor, I have a complete report of the pathological.

The Court: I think perhaps the doctor is qualified to express an opinion generally on the subject, subject to cross-examination.

Mr. Scholz: And the weight, of course, is a matter of——

The Court: Counsel may cross-examine wider.

Q. (By Mr. Scholz): Doctor, after reviewing the complete report and the full report in this case and reading all the report and knowing the history of it, do you think, in your opinion, that his death was caused by a slight blow on the abdomen [28] on December 23, 1946?

A. After I read the report and after my formal examination, and after he has not been sick before, there is no other explanation, if you look for an explanation at all, what could have caused the trouble; the report only mentioned a hardening of the blood vessels. That is the only pathological finding in the report. The post mortem showed that there was a rupture of the large bowel. It could be possible that was caused by a blood clot or thrombosis, closing off the blood supply to the

(Testimony of Morris Wirthheim.)

large bowel; and it might also be caused by an injury, but I am unable to say anything definite about it. It is a possibility. There is no real explanation what else could have caused it.

Q. What other causes could be the reason for his death than the blow to his abdomen on December 23, 1946?

A. Infection processes, ulcers, but there was no finding of an ulcer of the bowel.

Mr. Bucher: Pardon me. If the Court please, may I please have that last word?

The Court: "Infection processes." Or he said there was nothing in the report that they found an ulcer and there was no infection.

A. (Continuing): No, no diverticulis. Dr. Ryan mentioned that, they didn't find any diverticulum that could cause it. Then the only thing mentioned in the report is sclerosis in the blood [29] vessels in his abdomen, but it could be possible that by thrombosis in the blood vessels, secondary drying up of the wall of the large bowel, could cause a rupture, could make a weak spot with secondary rupture, but nobody can tell that for sure.

Q. Then, as I understand your testimony, Doctor, it is possible that this blow in the abdomen could have caused his death, it is possible?

A. It is possible.

Q. But now, in your opinion, was it probable?

A. It is only a possibility.

Q. I understand you stated it is a possibility, but I ask you now, Doctor, as an expert witness,

(Testimony of Morris Wirthheim.)

is it, in your opinion, that it was probably caused by the blow on the abdomen on December 23?

A. Probably—if that means the same like possible.

Q. No, probably and possibly doesn't mean the same.

A. It is more——

Q. Possibility, as I understand it, Doctor, so we have a community of thought on the words—and I may be wrong—possibility is that it could happen, but probability means that the assumption is that it did happen that way, at least that is what I have in mind when I asked you these questions.

A. Yes, there is a certain degree that it could be caused by the accident; probably that it could be caused to a certain degree, maybe 25 per cent or 30 per cent by this accident. Is that what you expect?

Q. Well, Doctor, not quite that way. Possibility means that it is, no matter how remote it could be, there is something that might cause it.

A. Yes, sure.

Q. But probability means that there isn't any remoteness, that it is more—the indicia is that it was definitely caused by that.

A. There was no other sickness before in his stomach, since there must be a certain degree, that it is probably the cause to a certain degree—it is caused by the accident after there was no other cause except the hardening of the blood vessels.

Q. I didn't quite get that. Did I understand you to say that it was probably caused by the accident?

A. Accident, regarding that there is no other definite cause for the perforation of his bowel.

(Testimony of Morris Wirtheim.)

Q. Oh, I understand you. In other words, if there is no other cause for the perforation of the bowel, then it must have been caused by the accident?

A. Then it is more probable that it is caused by the accident.

Q. But is there any other causes that could intervene, from reading this history, that could intervene in this case so it was not caused by the perforation of the bowel?

A. Abnormal changes in the blood vessel—that is up to the [31] pathologist to decide if there was such a degree of changing, since the blood vessels, that could explain the necrosis. The report doesn't show that it is such, and that it is far advanced hardening of the blood vessels.

Q. I am not quite sure of what you mean.

A. It is difficult to decide that question. I think nobody can decide the question.

Q. In other words, as I understand your opinion, you mean that nobody can come up and state, no doctor can come up here and state, that this was caused by the accident or it was not caused by the accident?

A. I should think we could say that nobody could decide that it was not caused by the accident. There is no other explanation, and we can't definitely say it is caused by the accident, but we can't tell for sure that it is not caused by the accident. We have nothing else sufficient to explain the hole perforation. The other explanations are not sufficient to say that it caused a perforation of his

(Testimony of Morris Wirthheim.)

bowel. Therefore, we come back to the cause what we know, and maybe the accident was the cause. We can't say it was definitely not the cause, that it is impossible.

Q. I think I understand you now.

A. It is difficult. I think it is more than we should testify.

Mr. Scholz: That is all, Doctor. [32]

Cross Examination

Q. (Mr. Bucher): I merely want to clear up one or two things, Doctor. You didn't see him again after that one visit, did you?

A. I have seen him only once.

Q. And that was at your office or at his home?

A. In my office.

Q. I see. And all you know other than that is what you have read in the pathological report, is that true?

A. That is all what I heard afterwards.

Q. Yes.

Mr. Bucher: That is all, if the Court please.

The Court: You may be excused.

Mr. Bucher: Do you have any other witnesses?

Mr. Scholz: Yes. Dr. Cooper, will you take the stand?

SIDNEY PRESTON COOPER

called for the United States, sworn.

Q. (The Clerk): Will you please state your name to the Court?

A. Dr. Sidney Preston Cooper.

(Testimony of Sidney Preston Cooper.)

Direct Examination

Q. (Mr. Scholz): Dr. Cooper, what is your profession? A. I am a surgeon.

Q. You are a chief surgeon at where? [33]

A. United States Marine Hospital.

Q. And how long have you been the chief surgeon there?

A. About two and a half years now.

Q. You are admitted to the practice of medicine in the State of California? A. Yes, I am.

Q. How long?

A. I think approximately a year and a half.

Q. And when were you first admitted to the practice of medicine?

A. 1929 in the State of Ohio. I have been in the Public Health Service ever since 1929.

Q. And are you specializing in surgery?

A. Yes, sir.

Q. Now, did you read all the report, the pathological and the microscopic and the neuroscopic reports on Peter Fotopulos?

A. No, sir, I didn't read it all. I glanced over it.

Q. You haven't read that full report yet?

A. No, sir.

Q. Wasn't this matter taken up with you by a Dr. Hollingsworth, at that time a staff meeting---

A. This was taken up at a staff meeting, and I was one of those who attended the staff meeting.

Q. And you were not acquainted with the full reports, then?

(Testimony of Sidney Preston Cooper.)

A. No, sir, not fully acquainted with them.

Mr. Bucher: Well, then, if Your Honor please,— [34]

The Court: I suggest a short recess. Doctor, you can that way acquaint yourself with the medical reports.

(Recess.)

Q. (Mr. Scholz): Dr. Cooper, during the recess you have finished reading the reports on this case, have you? A. Yes, sir.

Q. Now, doctor, isn't it a fact that in accident cases where there is an abdominal injury occurs, that some internal organs is ruptured?

A. Abdominal injuries may cause rupture of internal organs.

Q. Now, in this case, they allege that there was an internal rupture, did they not?

A. That is the record.

Q. And if that is so, wouldn't the result and the symptoms of such an injury appear shortly thereafter?

A. They almost always do appear immediately.

Q. And in the lapse of time, the lapse of time in this case, would indicate that blow on the abdomen on December 23, 1946, was not the cause of death?

Mr. Bucher: Well, if the Court please, I don't want to interpose unnecessary objections, but I do believe, instead of leading the witness—this witness is able to testify properly.

The Court: Yes, I think so, counsel.

(Testimony of Sidney Preston Cooper.)

Mr. Scholz: I am leading him, frankly, because I have not had the opportunity to talk to him. It was rather a surprise [35] that he was produced this morning. I anticipated another doctor.

The Court: Well, I would suggest, counsel, that you refrain, so far as you are able, from leading the witness.

Mr. Scholz: Yes, sir.

Q. Doctor, you recall that there was a mention in the report of the diverticulis?

A. I remember glancing over the pathologist's report, and it was either in a previous report or it was discussed at the staff meeting, that there was a diverticulum found at some time, either by the coroner or the pathologist. Now, I can't see it in this report.

Q. Assuming that this was found, what is a diverticulum?

A. It is a protrusion, a diverticulum of the large bowel is a protrusion of the mucosa through the wall of the large bowel, and these perforate rather frequently.

Q. Now, would a diverticulum then be caused, necessarily be caused by a blow?

A. They are rarely caused by blows. As a matter of fact, we don't know the cause of them. They are usually congenital.

Q. Now. Doctor, if there is an abdomen injury on the 23rd of December, 1946, and there is no exterior symptoms of that and no complaint until approximately January the 3rd of the following year,

(Testimony of Sidney Preston Cooper.)

would you say that that could have been, would be the result of a blow on the abdomen? [36]

A. I couldn't be specific in either direction, because it could be, but would not be probable. Now the reason I say that, I have seen injuries that manifest themselves, a serious manifestation, much later than the injury. or instance, a ruptured spleen. You may have pain immediately, a small amount, moderate amount of shock, and then three weeks or months later, you can have hemorrhage from the spleen, that we assume was caused by the original accident.

Q. Doctor, calling your attention to the pathological report of Dr. Carr, which I believe states that the examination of cross section of the colon from the area of rupture does not show any direct evidence of trauma. That is as to that one area; would not that area show evidence of trauma, if it was the result of a blow on the abdomen?

A. I couldn't, I would say there would be difficulty telling with that length of time.

Q. You couldn't tell yes or no?

A. No, this man obviously had a peritonitis from the report that I read. And he obviously had perforations.

Q. Now, in that case, would the area of injury extend to the inner layer, in your opinion?

A. I mean, it is impossible to say a man was injured the 23rd of December, and on the 7th of January that you can tell whether an injury, with peritonitis, extended through the three layers of

(Testimony of Sidney Preston Cooper.)

the bowel. At least, I am not a pathologist, but as a [37] surgeon, I couldn't tell. If you want me to summarize to you—may I give my opinion on this thing? I can do it in about two minutes, and it will be either I don't know, or I do know something about it, and that way I can get through here.

The Court: Is there any objection on that?

Mr. Bucher: No objection.

A. This man, from the report I read, gives the history of a generalized peritonitis. He had one or more perforations, one was described as a transverse colon. According to the description, one was also in the secum. Also in the report, it said in one place that he had an ileostomy, which is a bringing out of the distal part of the small valve. The doctor testified this morning, and I heard, that he did a colotomy, or secostomy, which is right next to that. It is the beginning of the large bowel. Now, this man had perforations—two at least. He had generalized peritonitis, inflammation of the bowels and intestines and everything inside his abdomen. Now, the most common cause for that, if you exclude appendicitis, if you call the appendix not a part of the large bowel—which it is, but excluding that, the most common cause, ordinarily in a man, is age. This man's age was 45 or 50?

The Court: 49.

The Witness: All right. The most common cause would be carcinoma, cancer of the valve, diverticulis and probable trauma, in that order. And by

(Testimony of Sidney Preston Cooper.)

a trauma I mean injury. Now, [38] from the history, I can not say that this man did not have a perforation which walled off and then opened up again and then got into peritonitis later on. The other doctor testified he had no signs of peritonitis after he saw him, which was soon after his injury. He had no signs of peritonitis. Now, this thing could have perforated, could have walled off, opened up again and given him signs of peritonitis. My own opinion, from this, is that he had a diverticulitis and either the pathologist missed it or they found it and it hasn't been reported. Now, I don't know, I am not a pathologist, I think they will admit they sometimes miss a diverticulum. I have missed them as a surgeon and pathologists have found them.

Q. But in your opinion, was it diverticulitis that he had? A. Probably.

Mr. Scholz: I think that's all.

Cross Examination

Q. (Mr. Bucher): If this man gave a history of a trauma on the 23rd of December, 1946, and thereafter, beginning that same day, he progressively complained of pain in the abdomen every day, which got worse and on the third day of January went to a doctor, was given some medicine and the condition again became progressively worse until the seventh day of January, when he was operated upon; and in the event the pathologist's report showed and the operating surgeon found a perforation of the transverse colon, wouldn't it be

(Testimony of Sidney Preston Cooper.)

your opinion, with that history, that a [39] clot had formed in the superior mesenteric artery which feeds the transverse colon, if I am correct?

A. That is right.

Q. It does? A. It does.

Q. And wouldn't it be your opinion that a clot had formed just at the junction of the mesenteric artery with the transverse colon which finally became walled off, preventing a supply of blood to the transverse colon and causing a rupture of the colon? A. It would not.

Q. Why not?

A. For the simple reason that my opinion is based upon my experience as a surgeon, and I have never seen a case like that. That doesn't prove that there aren't any, that is my experience. Now, No. 1, I take the most common cause first. No. 2, I can't conceive of a thrombosis of one of these small arteries not being found; that is, small enough that it wasn't found by the coroner. That is to say, without having a more diffuse finding, pathologically. In other words, they ought to find it where one or two of these small ones break off with such an excellent collateral blood supply to the large valve. I don't think it would cause ulcers or perforations.

Q. Well, do you call the superior mesenteric artery a small blood vessel? It leads from the aorta to the heart, doesn't [40] it?

A. It leaves the aorta.

Q. I beg pardon?

(Testimony of Sidney Preston Cooper.)

A. It leaves the abdominal aorta.

Q. And follows through to the transverse colon. It is the main artery, isn't it, supplying the colon?

A. It certainly is, and I know where it is, because——

Q. Yes, of course.

A. But it branches out in thousands of minute branches.

Q. And that is true. But you don't mean——

A. I mean to insinuate that if that was stopped down here at the lower part, then you would have gangrene of not a tiny little ulcerated area described in centimeters or millimeters, but you would have gangrene of the whole bowel or the whole loop of the bowel.

Q. Well, but didn't you understand Dr. Ryan to testify that there was a diffuse condition throughout that section filled with pus and poison and fecal matter?

A. Which could be caused by a diverticulum or carcinoma or a whole lot of other things.

Q. Yes, so as far as you know there was no evidence of carcinoma or cancer, is there?

A. That is not evident in the report, right.

Q. And so far as you understand it, there was no evidence in the pathologist's report of a diverticulum, is that true? [41]

A. I believe, sincerely believe that I saw a report of a diverticulum either when this thing was shown to me first, or later. I don't see it in this re-

(Testimony of Sidney Preston Cooper.)

port. Now, that is my honest opinion. I think there was a mention of a diverticulum.

Q. But if there was no evidence introduced here of a diverticulum, you then would be of the opinion that the trauma being the third in line, in your opinion, might be the cause of the accident, is that true?

A. My opinion is that it might be the cause, correct—that it might be the cause.

Q. But in the absence of any other history of illness, you then still believe that the weight is against that being the cause and that it was caused by some other condition? A. That's right.

Q. Even though the man was apparently in good health otherwise, prior to that time?

A. Yes, he gave a history of passing blood, which is very common.

Q. After the injury?

A. I don't know whether it was afterward or before.

Q. Well, if the history was of passing the blood after the injury, would that affect your opinion?

A. No, it wouldn't affect my opinion one way or the other, it would be a symptom of either.

Mr. Bucher: That's all. [42]

THOMAS F. CRAHAN

called for the United States, sworn.

Q. (The Clerk): Will you state your name to the Court, please?

A. Thomas F. Crahan.

(Testimony of Thomas F. Crahan.)

Direct Examination

Q. (Mr. Scholz): Doctor, with the suggestion of counsel and with the permission of the Court, I will try to make this very brief. You have read these reports, have you, Doctor?

A. I have.

The Court: For the purpose of the record, identify the report, counsel, identify the particular reports that the doctor has read, so that we may have it.

Q. (Mr. Scholz): The neuroscopic report, the pathological report and the microscopic report.

A. I have.

Q. Now, Doctor, to sum it up, would you state, after reading the report and hearing the testimony here this morning, what is your opinion as to the cause of the death of Mr. Fotopulos?

A. The cause of the death was given by the coroner. He said it was a generalized peritonitis following a localized abscess in the abdomen.

Q. In your opinion, Doctor, could that have been, or was it caused by a blow in the upper part of the abdomen on December 23, 1946? [43]

A. Well, it is conceivable.

Mr. Bucher: I beg pardon?

A. (Repeating) It is conceivable. It might be due to that.

Q. In your opinion, was it caused?

A. Oh, I couldn't say with any degree of certainty whether it was or not.

(Testimony of Thomas F. Crahan.)

Q. Doctor, in your opinion, would that be the probable cause of the death?

A. After you rule out a multiplicity of other indications and then you come to the facts at hand, then you possibly could conclude that the cause of death was attributable to trauma.

Q. What are the other conditions that you would have to rule out?

A. You would have to rule out carcinoma.

Q. Well, wait a minute. Let's take that. Carcinoma—was any evidence of carcinoma in there?

A. Not from the report of the pathologist who saw the original section that was removed at operation.

Q. Then you don't think that would have any effect on his death, then?

A. Not carcinoma, no.

Q. All right, that's out. What is the next one?

A. Diverticulosis, diverticulitis.

Q. What was that last one?

A. Diverticulitis, which is nothing more than—

Q. Was there any evidence of diverticulitis?

A. Not from the pathological report that I read. The hospital pathologist described the lesion is a localized abscess around the transverse colon, and that is as far as he went. Now, sometimes an inflammatory condition progresses to a point where it destroys the original point of attack so that you don't know what went on. You can surmise, you can theorize, but that is as far as you can go.

Q. In other words, you can't definitely say it was one thing or the other, is that correct?

(Testimony of Thomas F. Crahan.)

A. That is correct.

Q. Would a person whose death was caused as indicated in this report be able to be active in his business and around from the time of the injury up to January 7?

Mr. Bucher: If the Court please, I object to that question, as there is no foundation, no evidence to the effect that this man was engaged in business until the 7th of January.

The Court: Sustained.

Q. (Mr. Scholz): Well, assuming this——

Mr. Bucher: May I ask this, then? I think that the evidence will be brought out later in our own time, and assuming for the present that he was active from December 23 to January 7.

Q. Assuming those things, Doctor, would that indicate that his death was caused by a blow on the abdomen, the upper part of [45] the abdomen?

Mr. Bucher: Same objection, if the Court please.

The Court: Sustained.

Q. (Mr. Scholz): Doctor, if the death was caused as indicated in this report, would that have been caused by a body—I mean, by a person striking the upper part of his abdomen against a steering wheel?

A. I couldn't say that. It might be the result of trauma. Is that what you are trying to ascertain?

Q. Yes. In other words, there is nothing definite one way or the other?

(Testimony of Thomas F. Crahan.)

A. Just from the reports that I read, there is nothing definite.

Q. That's right.

Mr. Scholz: That's all.

Mr. Bucher: No questions.

The Court: You are excused.

Mr. Bucher: Call Mr. Duba.

JOHN DUBA

called for the plaintiff, sworn.

Q. (The Clerk): Will you state your name to the Court?

A. My name is John Duba, D-u-b-a.

Mr. Bucher: May it please the Court, counsel for the defense has agreed with me that the itemized invoice of job [46] order No. 28490 of the J. E. French Company covering the repairs to the Dodge truck driven by the deceased may be introduced into evidence. Is that correct, counsel?

Mr. Scholz: Yes. In other words, if that was done, I have no objection to that being entered into evidence.

You can identify that?

The Witness: I have my original estimate here.

Mr. Scholz: Just ask him. I can't stipulate, but I have no objection.

Direct Examination

Q. (Mr. Bucher): Mr. Duba, did you bring with you under subpoena a copy of the itemized invoice of job order No. 28490?

A. Yes, (producing papers).

(Testimony of John Duba.)

Q. I hand you this and ask you if that is——

A. I will have to reverse this. It is on the other side. There is an error in here, I see.

Q. Well, have you a copy, Mr. Duba, of your invoice?

A. I have the original bill here.

Q. You have the original bill?

A. There is an error here, I notice. I never looked at this one at all.

Q. All right, Mr. Duba, what is your occupation? A. As an estimator.

Q. Employed by whom?

A. J. E. French Company. [47]

Q. Was that your position on the 23rd of December last? A. Yes.

Q. And as such estimator for J. E. French, did you have occasion to examine a Dodge truck owned by the P. F. Casings Company on the 23rd of December?

A. Yes, I remember the thing clearly. As I was sitting there——

Q. Did you make an examination of the Dodge truck? A. First I totaled it.

Q. I beg pardon?

A. I estimated the car as a total.

Q. What do you mean “as a total”?

A. As a total car beyond repairs.

Q. Oh. Then did you estimate and examine the particular damage to the front and rear end of the car, the truck?

A. I don't remember. I have went through with

(Testimony of John Duba.)

an insurance adjuster. He came out here and specified what he wanted done to the car.

Q. Well, can you state to the Court what damage, in a brief manner, what damage was caused to the front of the truck?

A. Well, according to these bills here, it says the whole front end.

Mr. Scholz: Well, just a minute, not according to the bills.

Mr. Bucher: No—Strike that.

Q. Mr. Duba, from the records that you brought with you, are [48] you able to state now, from your recollection as to the general damages to the truck?

Mr. Scholz: You mean caused by this accident?

Q. (Mr. Bucher): Caused by this accident on the 23rd of December.

A. Well, the only thing is, the cab, between the cab and the pickup body, it has dropped right in the center.

Q. Now, what is the damage to the front of the truck, roughly?

A. Well, both front fenders and the grill——

Q. And the grill smashed? A. Yes.

Q. Now, what was the damage to the rear of the truck? A. The tailgate, I imagine.

Q. The tailgate. Was there any more damage to the lefthand corner of the Dodge truck than there was to the righthand corner of the Dodge truck?

A. Oh, that I don't know.

Q. Well, can you tell, from your repair bills, what you repaired?

(Testimony of John Duba.)

A. Well, it doesn't say anything about any of the rear fenders, no.

Q. Does the body of the Dodge truck extend back beyond the fenders in the rear?

A. What was that again?

Q. Does the body of the Dodge truck extend to the rear beyond [49] the fenders?

A. No. The body is inside the fenders.

Q. The fenders protrude? A. Yes.

Q. And now you say there was a damage to the tailgate?

A. Yes, there was damage to the tailgate here and the rear cab.

Q. And the rear what?

A. The rear cab. That was due to when the body, the rear pickup body, went down and hit the cab.

Q. Yes, but was there damage to the tailgate, was there evidence of damage to the tailgate showing that it had been struck by another vehicle?

A. Oh, I wouldn't know that. We have replaced the tailgate and the rear tail light lens and all that.

Q. And there was no evidence of any greater damage to the left rear corner than there was to the right, is that true? A. That's right.

Mr. Bucher: That's all.

Cross Examination

Q. (Mr. Scholz): Mr. Duba, you don't know yourself, personally, what the damage was caused by in this accident, do you? A. No.

(Testimony of John Duba.)

Q. You were not in the accident at all, you were not at the [50] scene of the accident at all?

A. No.

Q. And all you are going by in the repair bill, is that correct? A. Right.

Q. But you did examine the truck, did you not?

A. Yes.

Q. And did you not find that the frame member had been so badly corroded that it was paper-thin?

A. That's right.

Q. And that the heavy metal had been placed on the floor of the body and that apparently when the frame buckled, the extra weight of this metal plate caused damage to the rear of the cab?

A. That's right. It dropped right down.

Q. And resulted in breaking the rear support?

A. The motor support.

Q. The motor support, making it impossible to drive, is that right? A. That's right.

Q. And you examined the body, frame, did you, to see that the corrosion was so great on the gas tank that it had to be replaced—that it was so thin due to corrosion, not the accident?

A. Well, the gas tank was rusted, but the owner had to pay for that himself. [51]

Q. I know, but that was due to corrosion, that had nothing to do with this accident? A. No.

Q. In other words, the whole car was very badly corroded due to certain acids that had been transported for a long period of time in it?

A. I wouldn't say the whole car, just the chassis.

(Testimony of John Duba.)

Q. But most of the damage was caused by the corrosion? A. That's correct.

Q. And most of the repairs, is that correct?

A. Yes.

Q. And as a matter of fact, it was corroded so badly that you could put your finger through the gas tank, could you not?

A. Oh, I don't know about that.

Q. Well, if it hadn't been for this corrosion, practically the only thing that could have happened in this accident would be damage to the rear tailgate?

A. Oh, I don't know. The front end was damaged, too.

Q. Was that caused by the corrosion with the blow or solely by the blow?

A. That must have been by the blow.

Mr. Bucher: I couldn't understand that.

Mr. Scholz: "It must have been by the blow."

Q. And is it a fact that the only damage you could find actually caused by any impact was the tailgate, is that correct? [52]

A. Yes. Tailgate and hinges, yes. I guess we had to repair them, the hinges and all that.

Q. The hinges where?

A. On the rear tailgate.

Q. That's right, the hinges on the tailgate and the tailgate. That was the only damage that could have been caused by any impact?

A. That's right.

Mr. Scholz: That is all.

(Testimony of John Duba.)

Redicert Examination

Q. (Mr. Bucher): Mr. Duba, did you repair the rear body sill? A. Yes.

Q. Was that caused by the accident?

A. The rear body sill, there are several of them. That is caused—no, by the body as it came down. They busted.

Q. And did you repair the rear motor support housing? A. Yes.

Q. Was that caused also by the caving in of the frame?

A. By the caving in of the frame, right.

Mr. Bucher: That is all.

Recross-Examination

Q. (Mr. Scholz): Well, the rear part there, the sill, was that the frame member that was badly corroded and a heavy metal plate had been placed on the floor of the body of the car? [53]

A. Well, that was wood, sir.

Q. Pardon? A. That was wood.

Q. Well, wasn't a heavy metal plate, had not a heavy metal plate been placed on the body or the floor of the body of the car? A. That is right.

Q. And the extra weight of that plate, together with corrosion, caused the damage to the rear of the cab?

A. Yes, it sank right down.

Mr. Scholz: That is all.

The Court: You may be excused.

Mr. Bucher: Mr. Failor.

HARRY A. FAILOR

called for the plaintiff, sworn.

Q. (The Clerk): Will you state your name?

A. Harry A. Failor.

Direct Examination

Q. (Mr. Bucher): Mr. Failor, what business are you in? A. Transportation.

Q. Automobile transportation?

A. That is right.

Q. How long have you been in that business?

A. About 20 years. [54]

Q. Twenty years?

A. Uh-huh (affirmative).

Q. Where is your place of business located?

A. 525 Jones.

Q. On or about the 23rd day of December last, do you recollect an automobile accident which happened at the intersection of Bush Street and Van Ness Avenue? A. Yes, I do.

Q. Where were you at that time?

A. I was at the used car establishment there, the Neil McNeil, 1350 Van Ness. That is right this side, on the south side of Bush Street on the west side of the street, or the east side of the street, rather. I was sitting at a desk there when I heard quite a crash.

Q. Pardon me just a minute. Referring to the diagram, do you refer to the location marked Used Cars? A. That's right.

Q. At the intersection? A. That's right.

Q. Now, will you proceed and tell what happened?

(Testimony of Harry A. Failor.)

A. Well, I was sitting, as I say, at a desk in the used car establishment there and heard quite a crash and ran out to see what had happened. As I got out there, I noticed a Ford pickup truck in the pedestrian lane this side of the zone, passenger zone, and an Army truck directly behind it. [55]

Q. A Ford pickup truck?

A. A Ford pickup truck.

Q. Was that a Dodge?

A. Well, it could have been a Dodge, as far as I know. It was a small pickup, anyway.

Q. All right.

A. And the Army truck was parked right behind it, and the Army people there, out of the truck, I believe, there was a woman with them, and a couple of army youngsters and the gentleman that was driving the pickup truck was arguing with them about the accident. The fellow said, "Well, my brakes didn't hold," or "I couldn't help it."

Q. The man who was driving the army truck said that? A. Army truck.

Q. Now, Mr. Failor, will you take these small slips that I have which resemble automobiles, and will you place the location of the Dodge truck as it was when you went right out, as you saw it?

A. This is supposed to be——

Q. This is the safety zone.

A. This is the safety zone?

Q. No, this is the safety zone in here. This is the first line, and this is the second line. Here is

(Testimony of Harry A. Failor.)

your one line and here is your second line.

A. This is the line this side of the safety zone, is that [56] correct?

Q. That's right. East.

A. Well, there is where the rear of this pickup truck was, right about in here.

Q. Now, will you press that in there? Now, will you locate the position of the army truck at that time?

(Witness complied.)

Now, will you resume your seat.

(Witness returned to witness stand.)

Q. Mr. Failor, I notice that you have placed the Dodge truck to the north of the pedestrian crosswalk, to the north. This is the north?

A. That's right.

Q. And directly behind it you have placed the army truck and the two are in parallel, or one is exactly ahead of the other, is that correct?

A. That's right.

Q. Were there other cars in the east of the two lanes?

A. Yes.

Q. There were other cars in here?

A. Some were parked at the curb.

Q. Now, some were parked at the curb. Then were there other cars in the lane, in the traveling lane to the east?

A. Yes.

Q. There were. Do you know whether the red light was on at [57] that time against the Van Ness Avenue traffic?

A. I wouldn't know.

The Court: At the time of the impact?

(Testimony of Harry A. Failor.)

Mr. Bucher: He wasn't present at the time of the impact.

Q. How long would you say it was from the time you heard the crash until you went out?

A. Immediately.

Q. A matter of seconds? A. That is right.

Q. Was anyone with you?

A. I think Jud McNeil might have been with me.

Q. Who? A. Jud McNeil.

Q. Jud McNeil went out with you also. Now, do you know—Strike that. Mr. Failor, how long had you been located in business at Van Ness and Bush?

A. I am located at 525 Jones Street.

Q. Well, were you located here also at that time?

A. I was temporarily associated with McNeil.

Q. You were. And have you had occasion to observe this intersection many times in the past?

A. Quite frequently.

Q. I will ask you if you know what "Stop" and "Go" lights at the northwest corner of the intersection of Bush and Van Ness, whether they can be seen by an automobile from Sutter Street to [58] the south as it approaches Bush Street (indicating)?

A. It all depends as to whether there is a street car in your line of vision, or not.

Q. If there is no street car in your line of vision, can you see it?

A. I am not positive, but I believe you can.

(Testimony of Harry A. Failor.)

Q. You believe you can. Were there any passengers in the safety zone at the time, do you remember?

A. When I went out there there were.

Q. Pedestrians, I should say. When you went out there there were?

A. There were some people.

Q. Was there any street car on the tracks?

A. I didn't notice that.

Q. You didn't see any. Now, Mr. Failor, from your experience as an automobile transportation man during the years, would you say, in your opinion, having in mind the location of the cars as they were at rest when you first saw them, that it was possible that the Dodge truck, the one ahead, cut in from the right ahead of the Army truck and was struck on the left rear corner of the Dodge?

Mr. Scholz: Just a minute before you answer that. Object to that, as it calls for the opinion and conclusion of the witness.

The Court: Sustained. [59]

Q. (Mr. Bucher): You didn't see any truck ahead of the Dodge when you went out, did you?

A. No, I didn't.

Q. Now, did you observe the damage to the front and rear of the Dodge truck?

A. I didn't observe the damage to the front of it, but I noticed the rear tail gate was smashed, and it was bent in the middle.

Q. You mean the truck, itself, was bent in the middle? A. Yes.

(Testimony of Harry A. Failor.)

Q. And the tail gate was smashed in?

A. Yes.

Q. And you didn't observe the front of the truck? A. No.

Mr. Bucher: That's all. You may take the witness.

Cross-Examination

Q. (Mr. Scholz): Mr. Failor, I believe you testified that you did not see any other trucks or any other vehicles in the immediate vicinity of the two, of the Army car and the Dodge pickup, at the time that you first saw this accident?

A. When I walked out there, there were vehicles against the curb and this side of the Army truck (indicating).

Q. Vehicles along here? (Indicating.)

A. That's right.

Q. Would you indicate where these vehicles were on the diagram? [60]

A. Here's three rows of them.

Mr. Bucher: The court can't see where he is.

A. (Continuing): There are three rows of vehicles.

Q. Would you mark it in there approximately the same size you have there, indicate something like this so you will have it? Write this in.

A. Take this to be the curb here, the cars were parked in here and there was another row of cars along in here (indicating). This was in the third, I would say the third car from the curb.

(Testimony of Harry A. Faylor.)

Q. As I understand it, then, there was cars parked along the curb at the point indicated by this line, here? A. That is right.

Q. Then we will mark that Defendant's 1. Shall I make that a little bit heavier, so the court can see it?

The Court: Use a red pencil, Mr. Scholz.

(Witness marked diagram.)

Q. (Mr. Scholz): And then there were other cars parked, a row of cars parked along here (indicating)?

A. This side of it. There is three lanes there.

Q. Well, there are actually two lanes, are there not, but the cement comes out there, which is a parking lane—isn't that correct?

A. From the the curbing. One lane, and then there are two lanes of traffic.

Q. Is that right, two lanes of traffic? Will you indicate [61] with this red pencil where that row of cars was when you first saw this accident?

A. Well, when I came out there were three lanes of cars parked, one against the curbing and one in the center here, or one this side of the safety zone (indicating).

Q. In other words, then there were also a car parked, which I will designate as Defendant's No. 2.

Mr. Bucher: He said "the cars in there."

Mr. Scholz: Cars.

A. (Continuing): The signal was evidently "Stop."

(Testimony of Harry A. Failor.)

Q. (Mr. Scholz): Well, how far did they extend? I don't want to——

A. Well, I would say two or three cars down, because I walked through the first and second cars to come over here.

Q. Will you write that in, because I don't know, I wasn't there.

A. Well, I will say there was a couple of cars, about two or three cars down this way, because I walked out there from here and through here (indicating).

Q. Then just to make this a little bit clearer, that's Defendant's No. 2 (marking diagram), indicating a series of three cars parked when you first came out, is that correct?

A. That's right.

Q. Mr. Failor, do you remember that you were visited by an agent of the FBI approximately 8/21/47?

A. I remember there was somebody up there from them. [62]

Q. And do you remember that you made a statement, apparently you made this statement to him, that you had no recollection of seeing any other trucks?

A. No. Any other trucks—there were passenger cars that I saw along there.

Q. And that you could not recall whether there were any other cars on the curb lane? A. No.

Q. You did not make that statement?

(Testimony of Harry A. Failor.)

A. Not to my knowledge, because I walked through two cars to get out there.

Q. Now, Mr. Fotopulos came into your place of business there on Van Ness Avenue?

A. I wasn't there, but I was told that he came in there.

Q. Oh, you don't know whether he came in?

A. I saw him come in, but I didn't talk to him. He wanted to use the phone there, I think Jud McNeil was there.

Q. He came into there to use the telephone, is that right? A. That's right.

Q. But you were not there at the time?

A. I don't believe so.

Q. Well, did you see Mr. Fotopulos?

A. I saw him walk in the building. I was standing in front then.

Q. That is the only time you saw him on that day?

A. Only time, other than when he was arguing with the drivers. [63]

Q. And was he arguing with the drivers after he had used your telephone, or after he came into your place of business to use your telephone?

A. Before.

Q. And when he came into your place of business to use the telephone, where were you at that time? A. Standing in the doorway.

Q. And when you heard the crash, did you stand at the door?

A. I was inside when I heard the crash, and ran out. I was at a desk.

(Testimony of Harry A. Failor.)

Q. And there was a loud crash, was there?

A. Considerable; I ran out to see what happened.

Q. Did Mr. Fotopulos appear to be injured in any way? A. Not to my knowledge.

Q. Where was Mr. Fotopulos standing when he was arguing with the driver of the Army car?

A. This side, in the center of the two trucks.

Q. Will you indicate that on the diagram?

A. Right about in here (indicating).

Q. We'll make that "X" and designate that Defendant's No. 3. That is where Mr. Fotopulos was standing when you first saw him?

A. When I came out there were the three of them arguing.

Q. And where was the driver of the Army vehicle standing?

A. Right in the circle with them. The three of them were together. [64]

Q. Will you indicate with an "X" there?

A. All three were in the circle.

Mr. Scholz: We will put another "X" right there, and that's where they were, that's Defendant's Exhibit 4 (marking diagram).

Q. And where were you standing at at that time that you heard this conversation?

A. Right near there, practically next to them.

Q. Will you indicate where you were standing?

A. Right in back of them, practically, right in here (indicating).

Q. The only damage you saw to the automobile of Mr. Fotopulos, as you recall, your statement was

(Testimony of Harry A. Failor.)

that the rear tail gate was broken and also there was a sway in the rear sill?

A. That's right. Not in the rear sill, in the body, itself.

Q. Well, the rear body?

A. In the frame. The body was bent up like this (indicating).

Q. In the rear?

A. Not the body, the whole line of the frame.

Q. The whole line. And that is the only damage you saw? A. That is all.

Mr. Scholz: That is all.

Mr. Bucher: No further questions.

Q. (The Court): You examined the interior of the cab?

The Witness: No, I did not. [65]

Q. You did not examine the steering apparatus at all? A. No.

Q. To determine whether it was on the same level or on an angle? A. No, I did not.

The Court: All right.

(The witness was excused.)

The Court: We will take the noon recess now. We will resume at 2:15.

(A recess was thereupon taken until two-fifteen o'clock p.m. this date.)

Afternoon Session, December 4, 1947, 2:15 p.m.

The Clerk: Case of Fotopulos, et al, v. United States, on trial.

Mr. Bucher: Mr. McNeil, for the plaintiffs.

JUSTIN L. McNEIL,

called as a witness on behalf of plaintiffs; sworn

Q. (The Clerk): Will you state your name to the court, please?

A. Justin L. McNeil.

Direct Examination

Q. (Mr. Bucher): Mr. McNeil, you are in the used car business in San Francisco?

A. Yes, sir.

Q. Located on the east side of Van Ness Avenue, between Sutter and Bush?

A. That's right.

Q. You have seen the diagram that has been put on the blackboard, have you?

A. I see it now. I haven't seen it before.

Q. And your place of business, as I understand it, is in that section marked "Used cars"?

A. That's right.

Q. Now, Mr. McNeil, do you remember anything unusual that happened at the corner of Bush and Van Ness Streets on December [67] 23, 1946, in the morning?

A. Well, there was an accident involving a Dodge pick-up and an Army truck.

Q. Where were you at the time of the accident, if you remember?

A. Well, I believe I was in the office.

Q. At your place of business? A. Yes.

Q. Did you hear any crash or collision of automobiles?

A. Yes, there was quite a crash out in front.

(Testimony of Justin L. McNeil.)

Q. What did you do?

A. Well, I walked to the front of the door and walked out in the street where the cars, where they had the wreck.

Q. Now, Mr. McNeil, will you indicate to the court the positions of the cars when you first saw them, when you went out? You may illustrate to the court. Or I might say, the two cars now placed on the board were placed there by the witness Harry Failor. Do those two cars, in your opinion, represent the position of each car at the time they came to rest?

A. Well, I would say pretty close.

Q. Well, what do you mean by "pretty close"?

A. Well, I don't quite think that that Dodge was up as far as Harry has it there.

Q. You mean you don't think the Dodge was quite as far toward the north as he has placed them?

A. That's right. [68]

Q. But were the two cars in an absolutely straight line with each other, or was either car on an angle?

A. No, they were both one behind the other.

Q. One was exactly behind the other. Did you observe any damage to the front or rear of the Dodge truck?

A. Well, the front.

Q. You can take your seat, if you will.

(The witness resumed the witness stand.)

A. (Continuing): The front of the truck, the grille had been pushed in, but whether that had been done by this accident, I don't know, because

(Testimony of Justin L. McNeil.)

there was no car in front of the Dodge truck when I seen it.

Q. There was no car in front of the truck at that time?

A. The back end of the truck had been damaged.

Q. Was the damage to the back of the truck as much on the right side as it was on the left side?

A. Well, it possibly could have been a little more on the left side, because it looked to me like the man in the Army truck had tried to swerve to the left in order to avoid him, so it could have been more to the left than it could to the right.

Q. But the Dodge car was absolutely parallel in the street car tracks, was it?

A. That's right.

Q. And the Army truck, as you saw it—

A. Was right behind him. [69]

Q. Square behind him?

A. He might have been a little bit to the left behind him, but they were right in a line.

Q. Now, how far would you say the Dodge truck, the rear of the Dodge truck, was from the front of the Army truck when they came to rest?

A. Well, when I saw it, I would say about eight or nine feet apart, but they had drifted apart by the time I got there. I mean, maybe one of them had backed up a little bit.

Q. Now, were there other cars in the east lane of Van Ness Avenue going toward the north?

A. That's right.

(Testimony of Justin L. McNeil.)

Q. At that time? A. That's right.

Q. Would you say how many there were?

A. I would think there was three in the lane and there were two parked at the curb.

Q. Abreast of the three in the lane?

A. That's right.

Q. Do you know whether there were any pedestrians in the safety zone?

A. No, that I don't know.

Q. You don't remember? A. No.

Mr. Bucher: That's all, if the Court please.

Mr. Scholz: Q. Mr. McNeil, with your permission I will remove these, so I will be able to write in. I will indicate on the outside at the same spot. Will you come down here and indicate, using approximately the size of this here (indicating), the position of the Dodge car when you first saw it?

A. Well, I would say that the front was right about here.

Q. Use about the same size, to indicate, the same size, about, as this (indicating).

Mr. Scholz: Can the Court see?

The Court: That's all right, I can see it.

A. In other words, the front end was about in the middle of the crosswalk?

Mr. Scholz:

Q. Yes. Well, mark what you indicated here as the position of the Dodge car, Defendant's No. 5.

(Witness marked.)

Q. Now, will you indicate the position of the Army vehicle when you first saw it?

(Testimony of Justin L. McNeil.)

A. I would say the Army vehicle was about like that (indicating).

Q. Thank you very much. We will mark that.

A. (Continuing): I might say that there were eight or nine feet between them, there.

Q. Well, change it and make it whatever you think is correct. Now, this is on scale. You know what that means.

Mr. Scholz: Do you have a scale here? [71]

Mr. Bucher: Yes. (Presenting to Mr. Scholz.)

Mr. Scholz: Q. Wait a minute, before you put that in, the scale on this is 8 feet to an inch. So you can say that is 8 or 9 feet, so here would be an inch. That would be the front of the back here. This is 8 feet and this is 9 feet, about here (indicating).

A. This here was about, I would say, about 8 feet between the two cars at the time I saw it.

Q. Then Defendant's No. 6 indicates the position of the Army vehicle at the time that you first saw it?

A. Yes.

Q. And Defendant's No. 5 indicates the position of the Dodge pick-up truck when you first saw it?

A. Yes.

Mr. Scholz: Will you resume your seat?

(Witness resumed the witness stand.)

Mr. Scholz: Q. As a matter of fact, wasn't the greater portion, if not all, of the Dodge pick-up outside of the line, the passenger lane running across Van Ness Avenue?

A. No, I don't believe it was.

(Testimony of Justin L. McNeil.)

Q. You did not see the accident, did you?

A. No, I didn't.

Q. Don't you have some recollection that there was another truck in front of the Dodge and the Army vehicle when you first saw it? [72]

A. No, I never seen the car in front of them. There might have been a car there.

Q. Didn't you state to the FBI agent, the agent of the FBI, that you saw around the latter part of August—that is when it was, wasn't it?

A. Yes.

Q. And didn't you state to him that you had some recollection that there was another truck in front of the pick-up of the deceased, but that you could not definitely remember?

Mr. Bucher: If the Court please—

A. No.

Mr. Bucher: If the Court please, I request that counsel, for impeachment purposes, fix the time and place and who was present.

The Court: Did the witness make those statements in writing, written statements?

Mr. Scholz: No, your Honor, this is the statement to the FBI. Mr. Lightbody, who will be here this afternoon.

The Court: You might state the time and the place.

Mr. Scholz: I have not the exact date, the date of the report is August 21, 1947.

Q. But you recall Mr. Lightbody or an agent of the FBI talking about it to you, about this case?

(Testimony of Justin L. McNeil.)

A. I recall talking to him.

Q. When was that time that he talked to you?

A. That I don't know.

Q. Was it approximately in August?

A. I couldn't be sure.

Q. At that time that he talked to you, did you recall that you made that statement to him?

A. No, I told him that I thought there might have been a car there from the grille being pushed in on the truck.

Q. And do you recall making this statement to him also, that you were not sure, but that you believed that there was a car in the curb lane?

A. No, there was cars in the curb lane, but no cars on the street car tracks that I remember.

Q. No, I didn't say "street car tracks."

A. There was cars in the curb lane.

Q. That the pick-up, after the accident, was either very near the pedestrian cross-walk or partially into the cross-walk—did you make that statement? A. That's right.

Q. And is that true? A. That's right.

Q. Then the pick-up, after the accident, was either very near the pedestrian cross-walk or partially into this cross-walk?

A. Well, as near as I remember, it was partially into the cross-walk.

Q. You did not spend much time observing the accident, did you? [74] A. No, I didn't.

Q. There are many—they are rather a frequent occurrence in that intersection?

(Testimony of Justin L. McNeil.)

A. We have quite a few of them there.

Q. Did you observe the rear of the Dodge pick-up?
A. Yes.

Q. And did you notice any damage on the left rear of the Dodge pick-up?

A. No, it seemed to be in the tail gate and the body of the truck seemed to be bent up.

Q. Did you notice any damage to the Army vehicle?
A. No, I did not.

Q. You didn't see any at all?
A. No.

Q. Did you look at it?
A. I looked at it.

Q. Did you notice that in the Army vehicle the mud was knocked off the front bumper?

A. No, that I didn't.

Q. Then the only damage, that I understand you testified to, is that you noticed the tail gate and the frame?

A. Yes, the body of the truck had been bent up, or the frame had been bent.

Q. Did you notice if the car was very much corroded?
A. No, I did not. [75]

Q. I believe you testified on direct examination that the damage was on the left side of the Dodge?

A. No, I said it could have been a little bit more to the left than it was in the middle.

Q. Yes, that's right. A little bit to the left of the middle?
A. That's right.

Q. Did you observe now, you were not interested in this case, were you?
A. No.

Q. You are not now, are you?
A. No.

Q. Did you have any occasion to observe

(Testimony of Justin L. McNeil.)

whether or not these cars were directly in line behind each other?

A. Well, I would say that they were.

Q. Did you take any pains, did you make any examination to see whether they were, or not, or is that just your best recollection?

A. Well, both of them were in a line of traffic—neither one was over the white line.

Q. Neither one was over the white lines. You mean this line here (indicating)?

A. That's right.

Q. As near as you recall—in other words, all you observed, then, as I understand it, is that the two cars were in the line between the safety zone and the line of the traffic [76] lane, the traveling lane?

A. They were what I would say, one was right directly behind the other, within a matter of maybe six or seven inches.

Mr. Scholz: That is all.

Mr. Bucher: That is all, Mr. McNeil.

Mr. Bucher: Mrs. Diamond Fotopulos.

MRS. DIAMOND FOTOPULOS,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Q. Your name is Mrs. Diamond Fotopulos? A. Fotopulos.

Direct Examination

Mr. Bucher: Q. Mrs. Fotopulos, may I caution you to speak loud enough to the Court, so that the

(Testimony of Mrs. Diamond Fotopulos.)

Court and counsel and the court reporter may hear your testimony as well as counsel? A. Yes.

Q. You are the widow of Peter Fotopulos, the deceased? A. Yes.

Q. Mrs. Fotopulos, several things have been stipulated to by counsel which will relieve my questioning you upon them. I will direct my examination to the day of the accident and the days following. Do you recollect the accident that your husband was involved in on the 23rd of December, last? A. Yes, I do.

Q. Were you at home during that day? [77]

A. I was.

Q. Did your husband leave early in the morning as usual? A. Yes, he did.

Q. In the Dodge truck? A. Yes.

Q. When did he return, what part of the day?

A. It was a little after noon, about close to one o'clock.

Q. And what happened when he came home?

A. Well, he was—

Q. Did he tell you about the accident?

A. Yes, he did.

Q. What happened?

A. Well, he was all shaken, white, and I asked him, "What's wrong?" I asked him if he was hurt, and he said he was. He said, "Yes I was in an accident, I was hit from the rear by a truck, and I hurt my stomach." So he sat down, tried to—

Mr. Scholz: If your Honor please, I think that will be objectionable, what "I was told."

(Testimony of Mrs. Diamond Fotopulos.)

Mr. Bucher: I concede. I will try to avoid that as much as possible. You can only state what you observed, and not what happened, not anything that he told you, Mrs. Fotopulos.

Q. Now, did he remain home the rest of the day? A. Yes, he did.

Q. Did he go to bed earlier than usual? [78]

A. He did, right away.

Q. When? A. Just as soon as he—

Q. Did he eat dinner that evening?

A. What is it?

Q. Did he eat dinner that evening?

A. Oh, no, he couldn't eat.

Q. Now, the next day was the 24th of December, the day before Christmas. Did he go to his place of business that day? A. Yes, he did.

Q. What time of the day?

A. Oh, it must have been about ten o'clock, about ten.

Q. Did he remain there long before he came home?

A. No, just a few hours and he came home again.

Q. He came home about what time of the day?

A. Oh, it must have been a little after noon, about 1:00.

Q. Did he eat solid food during these days?

A. No, he didn't.

Q. What did he eat?

A. Just broth or soft-boiled eggs. I would make him a custard or jello—very light food.

(Testimony of Mrs. Diamond Fotopulos.)

Q. Now, Mrs. Fotopulos, following Christmas day, until the early part of January, did he go to his place of business every day?

A. Yes, he did, except just for a week. [79]

Q. For about a week. When, following the 23rd of December? A. Yes.

Q. And then what did he do after that?

A. Well, he kept getting worse every day, complaining of his stomach, pain in his stomach, so I pleaded with him to go and see a doctor, but he didn't believe in going to doctors, he said, "I'll be all right."

Q. Never mind what he said, but, well, did he finally go to a doctor?

A. Yes, he did. He went to a Doctor Wertheim.

Q. That was on the 3rd of January?

A. Yes.

Q. Now, New Years was on the 1st day of January, of course, and do you remember whether he worked on the 2nd of January?

A. No, he couldn't work then.

Q. Did he go to his place of business at any time after the 1st day of January?

A. He just, I don't believe he did. I don't remember exactly, but I don't believe he did after that. He just was he just couldn't stand up any more. He was getting worse every day.

Q. Well, he was up and around on the 3rd of January, was he, when he went to the doctor's office? A. Yes.

Q. And did he come home directly from the doctor's office? A. Yes, he did. [80]

(Testimony of Mrs. Diamond Fotopulos.)

Q. Did he go to bed early that day?

A. Yes, he did.

Q. Do you know what time?

A. Oh, right as soon as he came home from the doctor's. Went right to bed.

Q. Was that in the afternoon? A. Yes.

Q. And then do you know what happened on the 4th of January, the day he went to Dr. Wertheim? Did he get up again?

A. Yes, he did get up, but he felt worse, and I pleaded with him to go and see a doctor or a specialist, someone that would know better than Dr. Wertheim. He said, "All right, I'll be all right, Dr. Wertheim said it was nothing."

Q. But he didn't go back to his place of business at any time after that?

A. No, it kept getting worse, he complained, crying all night and in pain, and finally on the 6th, I think it was the 6th of January, we were up all night. The children and I. We couldn't do anything for him. We tried our best to comfort him, and it just seemed impossible toward the early hours of the morning. I called up Dr. Ryan. I couldn't stand seeing him suffer like that. So Dr. Ryan wasn't there. They got in touch with Dr. Musser. I told him the symptoms, and I told him about his pains, and that it kept getting worse, so he said, "Bring him to the hospital right away so I can look him over." [81]

Q. Then you took him to the hospital?

A. Yes.

(Testimony of Mrs. Diamond Fotopulos.)

Q. Now, Mrs. Fotopulos, while your husband was alive he was owner of what is known as the P. F. Casing Company, was he? A. Yes.

Q. That was a one-man company, was it not?

A. Yes.

Q. Owned and operated by himself?

A. Yes.

Q. That was in the treatment and sale of casings for meat—sausages, wasn't that it, isn't that right? A. Yes.

Q. And since then, has that business ceased to operate?

A. Yes. I tried to work the business, but I couldn't make a go of it. I kept losing money every day, I finally had to close it down.

Q. You got nothing for it?

A. No, I have nothing for it.

Mr. Bucher: You may take the witness, Counsel.

Cross Examination

Mr. Scholz: Q. Mrs. Fotopulos, Mr. Fotopulos had two accidents and sickness policies with Occidental Life Insurance Company?

Mr. Bucher: I object to that, if the Court please. I can't see any relevancy between that question and this case, as to whether he had any sickness or accident policies. [82]

The Court: Sustained.

Mr. Scholz: Q. Your brother's name is John J-a-h-m-a-k-e-s? A. Yes.

(Testimony of Mrs. Diamond Fotopulos.)

Q. And isn't he the manager of the P. F. Casing Company?

A. Yes, he helps me work it.

Q. And he took over the management of the business, did he not?

A. We both did, together.

Q. And he is now managing the business?

A. No.

Q. Who is now managing the business?

A. I lost the business completely. I couldn't make a go of it.

Q. Now, didn't Mr. Fotopulos go down to the place of business, up to the time he went to the St. Francis Hospital?

A. Yes, the first week he did.

Q. In other words—

A. Just a few hours a day.

Q. In other words, he went to the hospital on January the 7th, did he not? A. Yes.

Q. And he went down to the business up to that date, did he not?

A. No, not up to that date.

Mr. Scholz: That is all.

Mr. Bucher: That is all, Mrs. Fotopulos. [83]

The Court: You may step down.

(Witness excused.)

Mr. Bucher: May it please the Court, I desire to introduce in evidence a certified copy of the death certificate.

Mr. Scholz: Well I haven't seen it.

Mr. Bucher: Well, it is a public record.

Mr. Scholz: But I don't know whether that—I think that is purely hearsay.

Mr. Bucher: That is certified as a public record.

Mr. Scholz: I know, but it is still hearsay.

Mr. Bucher: Well, can it be introduced for what it is worth?

Mr. Scholz: Of course, that is up to Court; but I still think it is hearsay.

The Court: What is the purpose of this showing? There is no question about the fact of death, is there?

Mr. Bucher: No question about the fact of death, but this shows the cause of death as indicated by the autopsy surgeon.

I will not press the issue, if the Court please because the evidence is already in. However, I desire to introduce a certified copy of the verdict of the Coroner's Jury, which clearly is admissible as being again a public document.

Mr. Scholz: I object to that upon the ground it is incompetent, irrelevant, and immaterial, and not binding upon the [84] United States, or any of the defendants.

Mr. Bucher: Testimony before the Coroner, or a transcript of testimony, is not proper evidence, but it has been held that the verdict of the jury is competent.

Mr. Scholz: I don't know how it could be when the parties are not present to testify, or without notice, I don't see how it would be binding on any of the defendants, or on anyone.

The Court: Objection sustained.

Mr. Bucher: At this time we rest.

(Plaintiff rests.)

The Court: You might have that document marked for identification.

Mr. Bucher: Yes.

The Court: Those several documents may be marked for identification.

Mr. Bucher: Yes, if I may, with the Court's permission.

The Court: They will be marked, just for the purpose of your record.

The Clerk: Death Certificate is marked Plaintiff's 1 For Identification; verdict of Coroner's Jury is marked Plaintiff's 2 For Identification.

(Death certificate was marked Plaintiff's Exhibit I For Identification; verdict of Coroner's Jury was marked Plaintiff's Exhibit 2 for Identification.)

The Court: There is also one other phase that I think [85] should be made a matter of record. The doctors were examined with respect to reports upon which they based their opinions in the light of the facts of the medical questions submitted to them. I suggest to counsel that you mark the several documents for identification in the record so it will be a matter of official record, merely for identification.

Mr. Scholz: That is true.

The Court: That can be done at the conclusion. I merely thought about it at this juncture. There is no special hurry.

MATHEW J. LIGHTBODY,

called as a witness on behalf of the United States;
sworn.

The Clerk: Q. Will you please state your name
to the Court, please?

A. Mathew Lightbody.

Direct Examination

Mr. Scholz: Q. Mr. Lightbody, what is your
occupation?

A. I am a special agent of the FBI.

Q. And how long have you been in such capac-
ity, such agent? A. Seven years.

Q. And you still are at the present time?

A. Yes.

Q. Now, at the request of the United States
Attorney's office, did you interview any witnesses
in regard to the present action pending in this
Court, the case of Fotopulos vs. United States
[86] of America? A. I did.

Q. And was there, among those witnesses, a
man by the name of Harry Failor?

A. I did.

Q. And at the time that you interviewed him
did you identify yourself as a Federal Bureau of
Investigation agent? A. I did.

Q. And you told him the purpose of it?

A. Yes.

Q. Did he say to you at that time— By the
way, what was that date?

A. I have some notes here that I think will

(Testimony of Mathew J. Lightbody.)

help. I can give you the dates from those (consulting notes). July 7, this year.

Q. July 7 of 1947? A. Yes.

Q. And where?

A. At their place of business, 1350 Van Ness Avenue.

Q. At that time did he state, in response to a question, that he could not recall whether there were any other trucks, any other cars, in the curb lane at the time of the accident?

A. Yes, he told me that he couldn't remember seeing any other cars in the curb lane.

Q. What else did he state to you at that time?

A. Well— [87]

Mr. Bucher: If the Court please—

Mr. Scholz: Well, withdraw that question. I think it is too—

Q. Did he also state to you that he had no recollection of seeing any other truck in front of the Dodge pick-up? A. That's right.

Q. And did you ask him the question if he knew anything more about the case than what he had already told you? A. Yes.

Q. And did he volunteer any information to you that the driver of the two vehicles, the drivers of the two vehicles, were arguing about the case, and that the Army vehicle driver stated that his brakes would not work?

A. He made no such statement to me.

Q. Now in the course of this investigation, did you also talk to a witness by the name of Justin McNeil? A. I did.

(Testimony of Mathew J. Lightbody.)

Q. And did he state to you that he had some recollection that there was another truck in front of the pick-up of the deceased?

A. Yes, he did make such a statement.

Q. Did he also make a statement that he was not sure, but that he believed there was a car in the curb lane?

Mr. Bucher: If the Court—

A. Yes.

Mr. Bucher: Wait a minute, I object to this line of questioning. [88] It is not proper examination for impeachment purposes, it is leading, directive.

The Court: Overruled.

Mr. Scholz: Q. Did he state that the pick-up was either very near the pedestrian crosswalk or partially into this crosswalk? A. Yes.

Mr. Scholz: That is all.

Cross Examination

Mr. Bucher: Q. Mr. Lightbody, did either Mr. Failor or Mr. McNeil tell you the relative positions of the two automobiles at the time they came to rest on the day of the accident?

A. Well, as I recall, they did state that they were together in the rear, that is—

Q. And they also stated to you that they were in direct line, one with the other, one behind the other, didn't they?

A. No, I don't recall that they did.

Q. Well, did you ask them about that?

A. I don't remember specifically.

(Testimony of Mathew J. Lightbody.)

Q. You don't remember whether you asked them the position of the cars, or not, do you?

A. I asked them what the position of the pick-up truck was, yes.

Q. And didn't they tell you that the pick-up truck was partially in the pedestrian lane facing north—isn't that what they [89] told you?

A. Yes.

Mr. Bucher: That's all.

Mr. Scholz: That's all.

The Court: You may be excused.

Mr. Scholz: Captain Jenkins.

TERRY O. JENKINS,

called as a witness on behalf of the United States;
sworn.

The Clerk: Q. Will you state your name to the Court, please? A. Terry O. Jenkins.

Direct Examination

Mr. Scholz: Q. Captain, what is your occupation?

A. I am the maintenance officer at the Presidio, sir.

Q. And how long have you been maintenance officer at the Presidio?

A. For a year and a half, sir.

Q. Have you gone through the prescribed schools of maintenance, prescribed by the Army?

A. I have, yes, sir.

Q. And what year did you take that?

A. 1940, sir.

(Testimony of Terry O. Jenkins.)

Q. And ever since that date, you have been associated with the Department of Transportation, maintenance of transportation, for [90] the Army?

A. Yes, sir.

Q. And are you familiar with the Army vehicle involved in this accident?

A. Yes, sir, I am.

Q. And immediately after the accident was a report submitted to you by the driver?

A. It was, yes, sir.

Q. And did you examine the vehicle, the Army vehicle?

A. Yes, sir.

Q. Did you find any damage to the Army vehicle?

A. The paint had been scraped off on the right side of the front bumper.

Q. The right side of the front bumper?

A. Yes, sir.

Q. Did you find any other damage to the Army vehicle?

A. None, whatever, sir.

Q. Did you notice—referring to the front part of the Army vehicle, was there any mud on that vehicle?

A. There was, yes, sir.

Q. It had not been knocked off by the previous accident?

A. No, sir, it had not.

Q. Still there?

A. Still there, yes, sir.

Mr. Scholz: May I have the exhibit referring to damage [91] to the Dodge car? I don't recall what number.

The Clerk: There is no exhibit such as that.

Mr. Scholz: Didn't you offer that in evidence?

Mr. Bucher: I didn't. I neglected to, but here it is. (Presenting document to counsel.)

(Testimony of Terry O. Jenkins.)

Mr. Scholz: If you are going to offer this anyway—

Mr. Bucher: Yes, it has to be offered. It can be marked for identification now.

Mr. Scholz: Well, this is not the one that he offered, is it? I thought he referred to one, the original one, and this one he couldn't quite identify.

Mr. Bucher: **He identified it, except he said** there was one minor item, he said there was a little variance. Otherwise, it is a copy of the original. I'll say this, Mr. Scholz, that was furnished me by the J. E. French Company.

Mr. Scholz: Well, if you are going to offer it in evidence I think you should at this time.

Mr. Bucher: You can examine him on it; I don't care.

Mr. Scholz: Q. Did you examine the Dodge pick-up? A. I did, yes, sir.

Q. Did you find any evidence—assuming there was a collision on December 23, 1946 wherein the Dodge pick-up was hit by the Army vehicle—did you find any evidence of any damage by that collision to the Dodge vehicle?

A. I did not, no, sir.

Q. Did you find any damage to the tail gate or tail light, or [92] whatever it might be?

A. The tail gate of that vehicle is missing at the present time, it is not on the vehicle.

Mr. Bucher: Well, I ask that that answer be stricken as not responsive to the question.

The Court: It may go out. When, Mr. Scholz,

(Testimony of Terry O. Jenkins.)

did the captain make the examination which he testified to, in point of time?

Mr. Scholz: Q. Can you answer that question?

A. It was either the day before Thanksgiving or the day after.

Mr. Bucher: Of this year?

The Witness: Of this year.

The Court: That is why I asked the question.

Mr. Bucher: Yes, I thought it was immediately after the accident. It is rather incredible that there was no damage to the Dodge car, in the light of the testimony that has thus far been elicited.

Mr. Scholz: I think so, too.

Q. Did you examine the height of bumper, the figures on how the Army car would strike, if it did strike the Dodge car?

A. Yes, I did. I made a drawing of the vehicle.

Q. What did you find?

A. The bottom of the Army bumper was 25 inches from the ground.

Q. Go ahead.

A. The bumper is eight inches wide. The bumper is made of [93] metal 7/32 of an inch thick.

Q. From your examination of the Dodge car and the Army vehicle, where would it have been possible for the Army vehicle to strike the Dodge car?

Mr. Bucher: I object to that, if the Court please.

The Court: Sustained. He may testify as to his physical examination; that is, the examination

(Testimony of Terry O. Jenkins.)

of the physical properties immediately after the accident. You may direct his attention to that.

Mr. Scholz: I don't think he examined it immediately after the accident.

The Court: He examined the Army car.

Mr. Scholz: Yes.

The Court: You examined the Army car?

The Witness: Yes, sir.

The Court: Q. Within the hour after the accident? A. Yes.

Mr. Scholz: I think he has already testified as to the physical damage on that, your Honor. I don't think—

Q. Did' you examine the brakes of the Army vehicle immediately after the accident?

Mr. Bucher: Wait a minute, object to that, if the Court please, on the ground that the condition of the brakes immediately, or as he said, within the hour after the accident, the accident having intervened in the meantime, is improper [94] direct examination.

The Court: Where is the driver of the car? Is he available?

Mr. Scholz: The driver of the car, they have taken his deposition, and the man who rode with the driver, I have the statement of the doctor. He won't be able to be here. But he will be available very shortly.

Mr. Bucher: Well, the deposition has been taken.

The Court: Where is the driver now?

(Testimony of Terry O. Jenkins.)

Mr. Scholz: In Massachusetts.

The Court: Is he in the United States Army?

Mr. Scholz: He has been discharged and he is in Shelburne Falls, Massachusetts. However, the deposition was taken, and I think your Honor has on file here the deposition of the driver. However, I think that will be admissible, if your Honor please, for this reason—

The Court: I will allow the question.

Mr. Scholz: Would you please repeat the question?

(Record read.)

A. Within an hour after the accident.

Q. And what was the condition that you found the brakes of the Army vehicle?

A. They were in excellent shape.

Mr. Scholz: That's all, I guess. [95]

Cross Examination

Mr. Bucher: Q. Captain, where were you on the morning of the 23rd of December?

A. I was at the post motor pool at the Presidio.

Q. And what was the first notice you had of this accident?

A. The driver of the vehicle brought a driver's accident report to me.

Mr. Bucher: Mr. Scholz—

Mr. Scholz: I have it.

Mr. Bucher: No, I am not asking you for that, but at the time the deposition of Mr. Hammond

(Testimony of Terry O. Jenkins.)

was taken, there were certain photographs introduced by you in evidence. I assume, if the Court please, that those are attached to the deposition. That is, the deposition of Roy Lee Hammond.

The Clerk: There are certain photographs in here.

Mr. Bucher: May I see that?

(Handed to counsel by the clerk.)

Mr. Bucher: That is all, if the Court please.

The Court: All right.

Mr. Scholz: Mr. Gaber.

JOHN FRANK GABER,

called for the United States; sworn.

The Clerk: Q. Will you state your name to the Court, please? [96] A. John Frank Gaber.

The Court: Before this witness is interrogated, is there any stipulation in the record thus far to the weight of the Army truck?

Mr. Bucher: No, your Honor.

Mr. Scholz: No, your Honor.

The Court: I think we should have a general description of the Army truck and the weight of it while the captain is in court.

Mr. Bucher: The captain should be recalled for that.

The Court: Do you know, Mr. Scholz? What is it? It is a ton or two tons?

Mr. Scholz: It is a 6x6, a Chevrolet 6x6, we call it.

The Court: It is a Chevrolet?

(Testimony of John Frank Gaber.)

Mr. Scholz: Yes. I might have it here.

The Court: Is it what we commonly refer to as a pick-up truck?

Mr. Scholz: I would rather ask the captain. What kind of a truck is that?

Captain Jenkins: That is a ton and a half stake-box, sir.

The Court: All right. Proceed.

Direct Examination

Mr. Scholz: Q. Mr. Gaber, in December of 1946 you were employed by the Atlas Towing Company of San Francisco as a driver? [97]

A. Yes, sir.

Q. And you went to Bush and Van Ness Avenue about 10:00 o'clock on December 23?

A. Yes, sir.

Q. And while there you saw a Dodge pick-up truck and an Army vehicle? A. Yes, sir.

Q. Now, will you indicate, disregarding anything you see on here, will you indicate where you saw the Dodge pick-up truck, when you first saw it, about 10:00 o'clock on the morning of December 23, 1946?

Mr. Bucher: Pardon me, Mr. Scholz. If the Court please, what time of day was this?

Mr. Scholz: About 10:00 o'clock.

The Witness: About 10:00 o'clock in the morning.

Mr. Bucher: Very well, thank you.

Mr. Scholz: Q. Now, this is scale drawn. Do you know what I mean by "scale"?

A. Yes, sir.

(Testimony of John Frank Gaber.)

Q. So this is about 11 feet here, and I presume the way we have got one of these little things—

Mr. Bucher: Cars, you mean.

Mr. Scholz: Yes. Well, that is all right.

Q. Well, this one here is eight feet to an inch. Here is one which says eight feet. So, put it in position more or less, as [98] near as you can.

A. Near where the truck was?

Q. Yes, where you saw the Dodge truck.

A. When I picked it up, the Dodge pick-up was lying right about in this position (indicating), and the Army vehicle was lying right in here when I picked them up.

Q. Now, will you indicate this one here?

A. That is the Dodge.

Q. That is defendant's No. 7. That indicates the position of the Dodge pick-up when you saw it?

A. Yes, sir.

Q. And that will be defendant's No. 8. It indicates the position of the Army vehicle when you saw it.

A. Yes, sir.

Q. Now, as I understand, then, the Dodge pick-up was just about the line, just short of it, a little bit over the line of the crosswalk?

A. Of the intersection, yes, the crosswalk.

Q. And the Army vehicle was behind it, but to the left of it?

A. Yes, it was in the center.

Q. That would have to be to the west of it?

A. Yes.

Q. Do you recall whether or not that Dodge

(Testimony of John Frank Gaber.)

pick-up was straight? I mean, assuming this is north and this is south, was that Dodge straight, or was it pointing slightly to the east or west? [99]

A. Well, when I picked it up, well, maybe just a couple of degrees to the west.

Q. A couple of degrees? A. Yes.

Q. A little bit to the west, is that right?

A. Yes, sir. Not very much, just slightly.

Q. Slightly? A. Yes, sir.

Q. And the Dodge, or the Army vehicle—

A. Was straight behind it, straight on up, in that line there (indicating).

Q. Straight north and south? A. Yes, sir.

Q. The driver of the Dodge pick-up was there, was he not, when you got there?

A. Yes, he was.

Q. And was there any appearance of any injury or anything to him that you could see, that you saw?

A. No, there wasn't. He didn't say anything. He walked around the truck while I hooked onto it and claimed into the cab of my truck and we went down to J. E. French, I drove in, he got out of the truck and walked around again and looked inside of this truck. Then he walked over to the front of my truck when I dropped his truck down, then he went back again, I guess. Dupont was there and they were talking about the truck in [100] back of mine.

Mr. Scholz: That is all.

(Testimony of John Frank Gaber.)

Cross Examination

Mr. Bucher: Q. Mr. Gaber, who have you talked with about this case since then?

A. Pardon?

Q. Who have you talked with about this case since then?

A. I haven't talked to anybody about it.

Q. Not a soul? A. Not a soul.

Q. Well, did you talk to any representative of the FBI? A. I talked to Mr. Lightbody.

Q. Well, then, did you talk to somebody—

A. (Interposing): But I haven't talked to anybody else. I mean, he came down to the garage and asked me some questions.

Q. When was that? When did he come to the garage?

A. I don't remember. It was back in—it must have been July or June or somewhere around there.

Q. June or July; that is the first time you talked with anybody about the accident, was it?

A. Yes.

Q. And did he tell you about what the position of those trucks was before you described it to him?

A. No, I told him what the position of them were.

Q. And you remembered very distinctly after six months just [101] what the position of those trucks were?

A. Yes, I do. I picked them up. I went on call and picked up the Dodge pick-up, and I remember

(Testimony of John Frank Gaber.)

exactly where it was, because I went around on the righthand side of it, then up to the front of it and backed up to the truck.

Q. Well, you are in the business of towing cars, aren't you? A. Yes, sir.

Q. You tow, I suppose, in the neighborhood of two or three cars a day? A. Ten or fifteen.

Q. Ten or fifteen a day? A. Yes.

Q. Week in and week out?

A. That's right.

Q. And do you remember the position of every car in every towing job that you do?

A. No, I don't, but that one there specifically I do.

Q. Why do you remember this one in particular any more than any other one?

A. On account of the Army truck was involved in it and I happen to remember the exact accident, exactly where they were.

Q. Because the Army truck was involved, that created a more distinct recollection in your memory, did it?

A. Yes, I remembered it a lot easier.

Q. What? [102]

A. It came to me a lot easier. I remembered it easier. I have a lot of wrecks.

Q. Now, isn't it true, Mr. Gaber, that you don't remember exactly the position of those cars?

A. Now—

Q. No, wait a minute. Isn't it true that you don't remember the exact position of those cars

(Testimony of John Frank Gaber.)

any more than you remember the position of other cars in other accidents, and that they might have been in a line, one right behind the other?

A. No.

Q. You insist on that?

A. That is where that truck was when I picked it up.

Q. You are positive of that?

A. Yes. It might have been straight when the accident happened and then again, somebody might have pushed it to where it was, but that is where I picked the truck up, half in one lane and half in the other lane.

Q. Now, you think that is about an hour after it happened?

A. It was about 10:00 o'clock, I guess.

Q. Around 10:00 o'clock.

A. Yes. It must have been about twenty minutes to a half hour after the accident.

Q. Well, they told you when the accident had occurred, did they?

A. No, that is what I figure. [103]

Q. You just guessed about that?

A. I figured that, because they have to call up to French and then French calls down to Atlas; I was down on a job, and called in and they gave me the job. Then we went in there and picked it up.

Q. You were on another job at the time?

A. Yes, and I called in to the office and they received a call from French. I believe they received

(Testimony of John Frank Gaber.)

a call from them to come out and pick up the truck and bring it to French's.

Q. Yes. And you don't know where the Dodge truck was in the pedestrian lane?

A. It was a little bit into it.

Q. It was a little bit over in the pedestrian lane?

A. Yes.

Q. But you are positive, are you, that it centered on the east side of the white line, is that right?

A. That's right.

Q. You are positive of that?

A. That is where I picked it up.

Q. In other words, you are sure that it wasn't over, headed over into the safety zone in that position (indicating)?

A. No.

Q. You are positive of that, aren't you?

A. Yes.

Mr. Bucher: That is all. [104]

Mr. Scholz: That is all, Mr. Gaber.

The Court: You may be excused.

Mr. Scholz: Now, if your Honor please, we have the deposition of Mr. Bailey, who was in the Army truck as the driver. Charles Arthur Bailey. He is now out of the Army, and his deposition was taken in Massachusetts, in Boston. We also have a witness by the name of Corporal Roy Lee Hammond. I have here the certificate from Letterman General Hospital that Corporal Roy L. Hammond is at this time a bed patient, and that he will be unable to appear in Court on Thursday, December 4, 1947.

“It is my opinion, unless unforeseen conditions arise, that Corporal Hammond will be able to appear in court at any time after the eighth day of December, 1947. (Signed) William J. Fleming, Captain, Medical Corps.”

We also have this deposition, because at the time I took his deposition, I was informed that he would be discharged from the Army, so in order to get his testimony, we took his deposition. I believe it would be better to have the witness here in person to testify, rather than merely reading the cold record.

The Court: Is the corporal's illness a serious one?

Mr. Scholz: No, he was here in court once before, but it was continued. At that time he complained that he wasn't feeling very well. As a matter of fact, while he was going to be discharged, he was held up because he was going through Letterman General Hospital. However, the doctor here testified [105] that unless that unforeseen conditions arise, he will be able to appear in court at any time after the eighth day of December, 1947. Whatever the Court wants to do on that, we have no objection.

Mr. Bucher: If the Court please, may I interrupt? This question of the deposition of Hammond, may I suggest that as counsel states, the deposition was taken with the idea that he was to be out of the Army before this case could be tried. However, the deposition was taken, it is in the regular form, sworn to. May I suggest to the Court—I am sure

the Court is familiar with the fact that the Rules of Civil Procedure of the Federal Court provide that the deposition of a witness, whether or not a party, may be used by any party for any purpose, if the Court finds the witness is unable to attend to testify because of age, sickness, infirmity, or imprisonment. I submit that the deposition could properly be read.

Mr. Scholz: Well, I think it is true, your Honor, but as counsel just said, he is not available at the moment, but, if the Court please, that is only temporary because of illness. But as I pointed out to the Court before this case came to trial, we had received information that he would not be available at the time of trial, but would probably be available shortly thereafter. Whatever the Court desires would be agreeable, but it would seem to me that perhaps the Court would prefer to have the witness testify in person rather than take the [106] cold record.

Mr. Bucher: Well, the deposition is very complete. It goes into all the facts.

Mr. Scholz: Yes, but the demeanor of the witness is not in the record, unfortunately. Well, we have the deposition of the driver, we can proceed on that.

Mr. Bucher: Yes, your Honor.

The Court: Let us take this up after a short recess.

Mr. Bucher: Very well.

(Short recess.)

Mr. Scholz: May I proceed with the reading of the deposition, your Honor?

(Deposition of C. A. Bailey.)

The Court: Yes, Mr. Scholz.

Mr. Scholz: Have we the original, or shall I read from the copy?

The Court: Do you desire the original?

Mr. Scholz: If your Honor please, I think this is an exact copy. (Reading)

“Be It Remembered that on Wednesday, November 12, 1947, pursuant to written stipulation of counsel in the office of the United States Attorney in the United States Court House and Postoffice Building in the City of Boston, County of Suffolk, of Massachusetts, personally appeared before me, Edward J. Grace, 11 Pemberton Square, Boston, a Notary Public in and for the Commonwealth of Massachusetts, [107] Charles Arthur Bailey, a witness called on behalf of the defendant. S. Lang Makrauer appeared as counsel on behalf of the plaintiffs. Gerald J. McCarthy, Esq., Assistant United States Attorney, appeared as counsel for the defendant.”

Mr. Bucher: We will waive the reading of the stipulations following that.

The Court: The stipulations are in the usual form?

Mr. Bucher: Yes, your Honor.

The Court: So ordered.

Mr. Scholz: Then we will go to the direct examination.

“Q. (By Mr. McCarthy): What is your full name? “A. Charles Arthur Bailey.

“Q. Where do you live, Mr. Bailey?

(Deposition of C. A. Bailey.)

“A. Shelburne Falls, Mass. R. F. D. That is the mail address. The residential address is Martin Road, Buckland, Massachusetts.

“Q. What is your occupation, Mr. Bailey?

“A. At present I am a molder in the Prophylactic Brush Company, Florence Massachusetts.

“Q. Were you in the armed forces of the United States? “A. Yes, sir.

“Q. In the armed forces of the United States on the 23rd day of December, 1946?

“A. Yes. [108]

“Q. Where were you stationed at that time?

“A. The Presidio at San Francisco.

“Q. Calling your attention to the 23rd day of December, 1946 were you driving an armored vehicle going north on Van Ness Avenue, San Francisco?

“A. I am not acquainted with the direction, I believe it was north.

“Q. I will show you this—”

Mr. Scholz: I have “chalk”.

Mr. Bucher: It should be “chart”.

The Court: May I change the deposition by stipulation of the parties to the word “chart”?

Mr. Bucher: Yes, your Honor, that occurred several places.

The Court: It is indicated now that it is changed to “chart”.

Mr. Scholz: I think your Honor will find probably several other places.

The Court: Well, then, a uniform change may be made throughout by stipulation?

(Deposition of C. A. Bailey.)

Mr. Bucher: Yes, if your Honor please.

Mr. Scholz: Yes, your Honor.

(Reading): "Q. I show you this chart marked Plaintiff's Exhibit 3. This diagonal here shows you the direction. "A. That is right.

"Q. In other words, from where you are sitting to your [109] right is north?

"A. That is right.

"Q. To your left is south? "A. Yes, sir.

"Q. Facing me across the desk is west? And back of you would be the east?

"A. That is right.

"Q. Now, having looked at the chart were you driving an Army vehicle in a northerly direction on Van Ness Avenue in San Francisco on December 23, 1946? "A. Yes, sir.

"Q. At what time of day?

"A. Approximately 11 o'clock, I am not sure.

"Q. You are sure it was not earlier than that?

"A. No, I would not say either way. I do not remember the hour of the day, in fact to be truthful until it was brought to my attention I did not know the exact date. I would not have remembered it.

"Q. Would it refresh your memory if I told you it was 9 o'clock in the morning?

"A. No, it could just as well be 9 o'clock. I would not say. I do not have any idea of the time now.

"Mr. McCarthy: I suppose we can stipulate that Van Ness Avenue runs north?

"Mr. Makrauer: I think so, from this plan, Mr. McCarthy. [110]

(Deposition of C. A. Bailey.)

“Mr. McCarthy: And Bush Street—

“Mr. Makrauer: Due East and West, yes.

It would appear so from the chart.

“Q. Refer to the chart and notice where Bush Street is. “A. Yes.

“Q. Take it over close to you. (Witness examines paper.) Are there two sets of car rails on Van Ness Avenue? “A. Yes, sir.

“Q. Do you recall as you approached Bush Street as to whether or not there was a safety zone there? “A. Yes, sir, there was.

“Q. As you approached Bush Street, did anything happen? “A. Yes, plenty.

“Q. Will you state what happened, please?

“A. Well, I hit the back of another vehicle. Now I cannot give a definite description of it. It has been quite awhile since then.

“Q. Do you recall whether or not it was a 1936 Dodge pick-up?

“A. A 1939, I thought it was. I might be mistaken on the year of the vehicle.

“Q. Will you state more in detail, Mr. Bailey, please, how this accident happened?

“A. Well, this other vehicle driven by Peter Fotopulos, I take it, was being driven on the extreme right-hand lane. [111] I was driving in the left of the center lane nearest the cartracks, which is this lane here (indicating). There is also a third lane over the cartracks.

“There was another truck in front of me. As far as the description, I could not tell you, I did not

(Deposition of C. A. Bailey.)

pay much attention to it. This pickup truck driven by Fotopulos cut from the right lane into the lane in front of me. There was no way for me to stop in time. I turned out to avoid hitting him.

“Q. Are there lanes on each side of the car tracks on Van Ness Avenue?

“A. Yes, two lanes on each side of the car tracks. Each car track has a lot of travel.

“Q. As the Army vehicle you were driving approached Bush Street on Van Ness Avenue, what lane were you traveling on?

“A. In the center lane on Van Ness Avenue, which would be this lane here. There are three lanes each way.

“Mr. Makrauer: These are the car tracks.

“The Witness: Yes, but it is a lane of traffic also. A lane of traffic in here right over the car tracks. The car tracks come together. There is a safety zone here and also here at each intersection (indicating). Then there is a lane of traffic on this side of the car tracks, on this side, and then over here. [112]

“Q. Which lane were you in?

“A. In the center, right here.

“Q. Will you indicate?

“Mr. McCarthy: Do you mind if he marks it?

“Mr. Makrauer: No.

“The Witness: Right here (marking the paper). One, two, three lanes.

“Q. This mark?

“Mr. Makrauer: Just a minute, Mr. McCarthy,

(Deposition of C. A. Bailey.)

before marking it, what are you going to have him do?

“Mr. McCarthy: Place his car there.

“Mr. Makrauer: O.K., all right.

“Q. Will you make a mark or draw a box indicating where you were driving at the time?

“A. That was about my position at the time.

“Q. Would you mark that A, please? That represents the Army truck you were driving?

“A. Yes, sir.

“Q. Will you indicate on that chart marked Plaintiff's Exhibit 3 where the truck that you later collided with was being operated?

“A. Right here, coming in front, in this zone here. It came in on the right of me, his vehicle.

“Q. Does this red line indicate a curb?

“A. That is the white line between the lanes, I take it. [113]

“Q. Put your mark on that, B, indicating the car you saw subsequently.

“Mr. Makrauer: Rub this out, where he started, so he will not get it all messed up.

“Q. Do you know where Sutter Street is?

“A. Yes, sir.

“Q. Sutter Street crosses, it is the cross street that runs parallel to Bush Street?

“A. Yes, sir.

“Q. And is south of Bush Street?

“A. Yes, sir.

“Q. Do you know whether or not there are stop lights at Sutter Street? “A. There are.

(Deposition of C. A. Bailey.)

“Q. Do you know whether or not you had made a stop at Sutter Street?

“A. No, I do not remember.

“Q. Well, now, do you know what the distance is approximately between Sutter Street and Bush Street?

“A. No, I do not. I do not have much idea. I am not very good at guessing distance. San Francisco is a long block, I know that.

“Q. As you travel between Sutter Street and Bush Street, what speed was your vehicle which you were driving being operated at? [114]

“A. Not over 15 or 18 miles an hour. I doubt if it was that fast.

“Q. As you approached Bush Street, what was the condition of the stop sign?

“A. I did not notice the stop sign. I did not get that far before this other vehicle cut in front of me. At that time all I thought of was stopping, anyway.

“Q. Did you apply your brakes immediately?

“A. Yes, sir, at once.

“Q. What distance did your car travel from the time you first applied your brakes until you collided with the vehicle that cut in from your right?

“A. A very short distance. I would not say exactly.

“Q. Give us your best judgment as to how far you went from the time you applied your brakes until the two vehicles collided with each other.

(Deposition of C. A. Bailey.)

“A. Not over twenty feet.

“Q. At the time you applied your brakes, Mr. Bailey, what was the speed of your car, the car you were driving?

“A. I cannot say exactly, 15 miles, probably.

“Q. Did the operator of the vehicle that you collided with, that came in from your right lane give you any signal of any kind?

“A. No signal whatsoever. He cut in before he was past me, so I could not have seen the signal if he did. [115]

“Mr. Makrauer: Will you repeat that answer?

“The Witness: He was right at the side of me when he cut in. He was not ahead. I could not have seen the signal if he had given it. He was at the side. He just missed cutting into the line.

“Q. You previously testified there was another truck ahead of you. In what lane was he operating?

“A. In the same lane as myself.

“Q. How far ahead of you was this other truck you refer to?

“A. Well, I would not say exactly, about possibly a length and a half or two lengths of track, not over 40 feet, 45 feet.

“Q. Do you know whether there was any other truck stopped at Bush Street as you approached it?
“A. No, sir, I do not.

“Q. Do you know whether or not the other truck referred to that was ahead of you stopped for the signal?

“A. I do not know. I believe he stopped for the

(Deposition of C. A. Bailey.)

signal but he left right away. By the time I was out of my car or before, he was gone.

“Q. As you approached the intersection of Bush Street, Mr. Bailey, was the speed of the vehicle that you were operating diminished?

“A. Beg pardon? [116]

“Q. Did the speed of the truck you were operating as you approached Bush Street change, did you reduce your speed? “A. Yes, sir.

“Q. Was that because of the fact you were slowing down for the signal?

“A. I was slowing down for the intersection as I always do.

“Q. Well, you did in this particular case also?

“A. Yes. I was not going as I say over 15 miles an hour, which was not fast anyway.

“Q. You had previously—

“Mr. Makrauer: Just a moment.

“Mr. McCarthy: I am sorry.

“Mr. Makrauer: You were not going over 15 miles an hour, you said.

“The Witness: I do not believe so, 15 or 18 miles an hour. I will not say exactly; it has been a long time ago.

“Q. Can you give us an idea, Mr. Bailey, of the speed of the car, the pickup truck that was being operated by Mr. Fotopulos?

“A. I have no idea.

“Q. Well— “A. He was driving.

“Q. Can you refresh your memory and give us

(Deposition of C. A. Bailey.)

your best [117] judgment of his speed as he passed you?

“A. Well, I could not. I do not know as I could even estimate it, because I never saw the truck. You cannot see much except from a side view of the car. By that time he was right in front of me.

“Q. When the Fotopulos car passed you, how fast was the vehicle you were operating traveling?

“A. About 15 miles an hour.

“Q. Was he going faster than you?

“A. He must have been.

“Mr. Makrauer: Just answer the question.

“Q. Yes or No, was the Fotopulos car traveling faster than you were? “A. Yes, sir.

“Q. What part of the Army vehicle came in contact with the Fotopulos car?

“A. The right front corner of the bumper.

“Q. That is the right front corner of the Army vehicle? “A. Yes, sir.

“Q. Came in contact with what part of the Fotopulos car?

“A. The left rear of the pickup body.

“Mr. Makrauer: Hit the left rear.

“Q. Did I understand you to say it was your right front bumper that came in contact?

“A. With his left rear, yes. [118]

“Q. What was the condition of the street at that time?

“A. Well, it was very dry. an ordinary dry day. The pavement was dry.

(Deposition of C. A. Bailey.)

“Q. Was there anyone else riding with you in the Army vehicle at the time? “A. Yes, sir.

“Q. Who was in the car?

“A. There were three passengers. I can give you the names of two. The other I have forgotten.

“Q. Who were they?

“A. Private First Class Roy L. Hammond.

“Q. And Horatio Salazer, Sgt. Horatio Salazer?

“A. Salazer, yes, sir. There was one Army nurse in the car.

“Q. Do you remember her name?

“A. No.

“Q. Do you know whether or not the pickup truck ran into the truck that you say was operating ahead of you?

“A. The two trucks collided. How it happened I could not explain.

“Q. After you had come in contact with the Fotopulos truck, the pickup truck, the Fotopulos truck went forward and bumped into the car, the truck that had been going in front of you?

“A. I am not sure how it happened, whether he hit the [119] forward truck before he was hit by me or afterward, I do not know.

“Q. Did you strike or contact the Fotopulos truck or car with much force, Mr. Bailey?

“A. No, sir, not much.

“Q. Did you say the driver of the Fotopulos truck gave you no signal before he cut from the lane on your right-hand or east side into the lane you were operating in?

(Deposition of C. A. Bailey.)

“A. None whatsoever.

“Q. Did you have any conversation with Mr. Fotopulos? “A. Very little.

“Q. Well, did you have any? “A. Yes.

“Q. What did he say, if anything?

“A. Well, he merely took my name. He called a man from the garage at the intersection to come over and make out a report for me. This man took my name and address and that was all. He stated I would have to wait for a tow car, so we both waited until the tow-car removed his truck.

“Q. Did he make any references as to how the accident occurred?

“A. None whatsoever. He never even mentioned it.

“Q. Did you say anything to him with reference to the [120] way the accident occurred?

“A. No. My whole intention at the time was to give him a medical examination if he wanted it so there would be no case against me. He stated he was O.K.

“Mr. Makrauer: Answer the question, Did you say anything to Mr. Fotopulos?

“The Witness: Yes, I am trying to tell you I offered him a medical examination and he refused it.

“Q. Did he say whether or not he was injured?

“A. He said he was not.

“Mr. McCarthy: Your witness.”

Mr. Scholz: Do you want to read the cross?

Mr. Bucher: Yes, I will read the cross.

(Deposition of C. A. Bailey.)

(Reading) "Q. (By Mr. Makrauer): Where were you coming from just before this accident took place?

"A. The railroad yards, 6 King Street, San Francisco.

"Q. What was the purpose of the particular ride you were taking at that time?

"A. To retain rations from the car at the railroad depot.

"Q. Was that on the Army business?

"A. Yes, sir, the Army railroad cars.

"Q. You were headed where?

"A. To the Presidio.

"Q. Was that an Army camp? [121]

"A. It is an Army base, yes, sir.

"Q. What was your rank? "A. T-4.

"Q. Does that mean you were a sergeant?

"A. Yes, sir.

"Q. Will you describe the truck you were driving in, the body of the truck?

"A. It was an open body, steel cab.

"Q. With a sealed cab in front where you were sitting? "A. Yes.

"Mr. McCarthy: A steel cab.

"Mr. Makrauer: A steel cab, open on both sides.

"Q. The cab was open on both sides?

"A. No, sir, doors.

"Q. With windows in them?

"A. An enclosed cab, yes, sir.

"Q. And you stated there were three people besides yourself in the truck?

(Deposition of C. A. Bailey.)

“A. Yes, sir.

“Q. Will you tell us just where the three people were sitting?

“A. There was one in front with me, the Army nurse and the two others in the back.

“Q. How were the seats arranged in back, Mr. Bailey? “A. Along the side of the body.

“Q. Looking at the chart you were going north, with the car going north, on what side of the truck were the seats located?

“A. Both sides, one on each side.

“Q. Which side were these two men sitting?

“A. I could not say exactly.

“Q. You do not remember that?

“A. I cannot see the back. It might be either side. I did not notice where they were. They might have been sitting on either side of the truck.

“Q. Was there an opening from the back of your cab where you were sitting to the rear of the truck? “A. Yes, sir.

“Q. An open partition? “A. A window.

“Q. Was that open? “A. Yes, sir.

“Q. Could you talk to them and they could talk to you?

“A. No. You could see through it. It was not open.

“Q. I just asked you if that was open?

“A. It will not roll down. I understood you to mean visibility.

“Q. What happened to the Army nurse right after the accident?

(Deposition of C. A. Bailey.)

"A. Nothing whatsoever. [123]

"Q. Just after the accident occurred, didn't an officer come right up, didn't people come up to the scene of the accident?

"A. No, sir, nobody came near us. The police cruisers drove by us and never stopped.

"Q. What did the nurse do immediately after the accident?

"A. She sat right in the truck.

"Q. You cannot remember the name of that nurse now?

"A. No, sir. She was unacquainted with me. She was on the train. She took transportation with me back to the Presidio. The only reason I ever inquired her name was to put it on my accident report.

"Q. How did she get in the truck?

"A. She wanted transportation to the Presidio.

"Q. Where did this occur?

"A. In the railroad yards.

"Q. Did you pick her up?

"A. Yes, sir, that was my duty to pick up passengers down there as well as rations.

"Q. You mean it was your duty to pick up anybody that wanted a ride?

"A. Any passengers on our train that wanted to ride back to our base was welcome to ride.

"Q. She was not in uniform? [124]

"A. She was. She was coming in from duty.

"Q. At the time the accident occurred, did you report the accident?

(Deposition of C. A. Bailey.)

“A. I reported it as soon as I returned to the base.

“Q. To whom did you report the accident?

“A. It was reported to the motor pool and then to the main office on the post, the Provost Officer.

“Q. Did you tell the Provost Officer at that time there was a nurse sitting in the front cab with you?

“A. I did. She was signed on my report as a witness.

“Mr. McCarthy: Just a minute. He has not testified she was sitting in the front cab with me.

“Mr. Makrauer: Yes, he has. I asked him that.
(The record was read.)

“Mr. McCarthy: I understood him to testify she was sitting in the back.

“Q. Two men in the back and the nurse in front? “A. That is correct.

“Mr. McCarthy: Was the nurse sitting with you?

“The Witness: In the front seat, yes, sir.

“Q. Can you tell us whether it was your duty to pick up passengers at the railroad station?

“A. I will not say it was a duty. It was customary.

“Q. I did not ask you that. I asked you—

“A. They were supposed to be furnished transportation. [125]

“Q. Just answer my question. You say now it was not your duty to pick up people?

(Deposition of C. A. Bailey.)

“A. I did not say it was not my duty. I did not say it was or was not.

“Mr. McCarthy: Is it material whether it was his duty or not? He testified she was there sitting in the front seat with him. I do not think it is material or relevant whether or not it was his duty.

“Q. The passengers were in the front seat with you, seated on the front seat and you were driving the truck? “A. Yes, sir.

“Q. And the other two, Salazer and Hammond, were sitting in the back of the truck?

“A. Yes, sir.

“Q. You cannot recall what side of the truck they were sitting on?

“A. No, sir. I have no idea.

“Q. You state definitely you reported this Army nurse was sitting in the front seat with you when you made the report to the Provost Marshal?

“A. There were no questions asked as to where anybody was sitting. I reported them as witnesses and that is all. They were riding with me.

“Q. Mr. Bailey, will you take a pencil and draw a line and show me the exact course of travel of your car. Now [126] this is a white line separating the lanes of traffic on Van Ness Avenue?

“A. Yes, sir.

“Q. Will you start at the beginning of the chart with the pencil and mark just how you came up?

“Mr. McCarthy: Just a minute now. May I

(Deposition of C. A. Bailey.)

straighten it out on that chart marked Plaintiff's Exhibit 3 which you referred to, the white line is in fact a red line, but it is a white line on the street.

“Mr. Makrauer: There is a white line on the street, that is correct. There is a note, all red lines are painted white on the street. It is just shown as red.”

Mr. Bucher: May I pause for a moment, if the Court please, and suggest that evidently an exhibit is attached to the original deposition. I have no copy of the exhibit. May I examine it just a moment? I haven't seen it.

The Court: It is. This so-called chart or diagram may be marked in evidence by stipulation?

Mr. Scholz: Yes, your Honor. I haven't seen it either.

(Counsel examined chart.)

The Clerk: Are you offering it?

Mr. Scholz: Yes, it is a part of our deposition. I think maybe the Court would like that marked.

The Clerk: Three for identification?

The Court: Is that in evidence? [127]

Mr. Scholz: That is in evidence, your Honor.

The Clerk: Three in evidence.

Mr. Scholz: That is part of the deposition of Charles Arthur Bailey.

The Court: It may be received.

(Chart referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 3.)

(Deposition of C. A. Bailey.)

M. Bucher (Reading): "Q. Which is the line of traffic? "A. Right here (indicating).

"Q. In the middle of the lane going due north?

"A. Yes, sir.

"Q. Now, will you continue that lane as best you can with what you have drawn, what is there now and show us just where the cars were immediately after the collision between yourself and the Dodge truck?

"A. Right here in this spot here."

The Court: You desire a ruling on this, or do you wish to withdraw it?

Mr. Bucher: I am not asking for a ruling. Counsel may.

Mr. Scholz: Yes, your Honor, I think there is evidence that the witness is out of the Army and is trying his best to give his recollection, and that he had testified considerably on this. I think the matter is objectionable, and I will join with the Assistant United States Attorney in that objection.

The Court: The objection is overruled. [128]

Mr. Bucher: (Reading) "Q. I want you to draw that exactly with reference to the safety zone and the crosswalk at the intersection. Will you draw it showing the position of your car and the position of the Dodge truck immediately after the accident? "A. It is very hard to do.

"Q. There is plenty of room there. This is a fair representation of the intersection?

"A. Yes, but as examples A and B are much too small to be fitted in the lane.

(Deposition of C. A. Bailey.)

“Q. Make them smaller so they will fit.

“A. They should be larger.

“Q. Make it in plain. This is a scale drawing. As a matter of fact, do you know how wide this lane is?

“A. No, I have no idea, probably about 10 feet.

“Q. Between the easterly side of the car track that is there? “A. Yes, sir.

“Q. And the curbstone which is here, could you estimate the width of that area for us?

“A. No, I would not try to.

“Q. Do you know how long this room is here?

“A. About 15 feet, probably.

“Q. This way, I mean? “A. Yes, sir.

“Q. It is nearer 20 to 25.

“Mr. McCarthy: Oh, now, no, I object to that. It is not 25 feet.

“Q. This accident happened less than a year ago, didn't it? “A. Yes, sir.

“Q. Haven't you some estimate of the width of those two lanes of travel between the easterly side of the car track and the curbstone?

“A. No, I could not give an estimate. It would be merely an estimate.

“Q. Give us that.

“A. As I say, each lane would not be over 10 feet wide, probably making it 20 feet.

“Q. This line represents your line of travel, you have drawn here? “A. Yes, sir.

“Q. You have drawn this car and marked it A. Did you intend to have that car straight?

(Deposition of C. A. Bailey.)

“A. No, sir.

“Q. You wanted it on a slant?

“A. My vehicle was parked with my left front wheel on the safety zone. His vehicle was parked there.

“Q. Show us exactly where your car was immediately after the accident when you came to a stop? [130]

“A. If I may be permitted to change this here, I can bring it on a different scale.

“Mr. Makrauer: Is that all right with you, Mr. McCarthy?

“Mr. McCarthy: You are talking about it after the accident is over.

“Mr. Makrauer: Immediately after the accident when all cars were at rest.

“Q. Show me where your car was and where the Dodge truck was you testified you hit.

“Mr. McCarthy: Do you want to erase this?

“Mr. Makrauer: Mark this A.

“Mr. McCarthy: Mark his car A.

“Q. That is B, the Dodge truck?

“A. Yes, sir.

“Q. Will you now show us where the car you testified to that had stopped for the red light was?

“A. I do not know where it was because he had left the scene, he was in front of me, and by the time I was out of my vehicle, he had left the scene.

“Q. Where was he the last time you saw him?

“A. Proceeding north on Van Ness Avenue in front of me.

(Deposition of C. A. Bailey.)

“Mr. Makrauer: I may be wrong, didn’t he testify it stopped for the red light?

“Mr. McCarthy: I do not believe so. [131]

“Q. Didn’t you tell us on direct examination there was a car here that stopped for the red light in the same lane of traffic?

“A. No, sir. I testified once before, I told you I was not sure of the color of the light at the time this other truck and myself approached the intersection.

“Mr. Makrauer: Could we go back to that a minute?

“(The record was read.)

“Mr. Makrauer: He testified there was a truck—

“Mr. McCarthy: He never testified, according to the Commissioner’s notes, he said he testified that the other truck stopped at a red light.

“Mr. Makrauer: I did not ask him that.

“Mr. McCarthy: I think you have. Whether you asked him, he did not testify to that.

“Q. You testified there was another truck ahead of you?

“A. Yes, sir.

“Q. On direct examination?

“A. Yes, sir.

“Q. Where was that truck? Will you show it to us on the plan?

“A. Proceeding north on Van Ness Avenue. He was ahead of me. I was following him.

“Q. Show us on the plan where he was when you first saw him ahead of you. [132]

(Deposition of C. A. Bailey.)

“A. When I first saw him he was two blocks down the street at Post Street. I followed him to this particular spot.

“Q. When you followed him to this particular spot, where was he?

“A. That I do not know. I was not watching him. I was merely watching my vehicle, and the vehicle directly in front of me, Exhibit B.

“Q. You do not remember very much about this accident at all?

“A. Truthfully I do not.

“Mr. McCarthy: Just a minute. I object to that question. He has testified considerably about the accident.

“Mr. Makrauer: Well, he has just testified that there was another truck a truck length or two truck lengths and suddenly this truck disappears. I would like to know where it was and where it went.

“Mr. McCarthy: He says he does not know. he says it kept on going.

“Q. Then you testified that this truck here, the Dodge truck, after you hit it, hit the truck ahead of you. How do you know that?

“A. I did not testify to any such thing.

“Mr. Makrauer: Go back to the direct examination again.

“The Witness: I will say— [133]

“Mr. Makrauer: Just a minute.

“Mr. McCarthy: Just a minute. Let him answer if he can.

(Deposition of C. A. Bailey.)

“Mr. Makrauer: Repeat my question to him.

“(The record was read.)

“Q. Then you did testify there was a truck there at the time this accident occurred, didn't you, Mr. Bailey? “A. Yes.

“Q. Do you want to change that now?

“A. No.

“Q. Will you tell us where the truck was? Will you show it?

“A. I do not know where it was. All I know is the marks of Mr. Fotopulos' truck where he hit the other forward truck.

“Q. You want to leave it there was a car ahead of you, that Mr. Fotopulos hit the truck and you cannot tell us where the truck was? “A. No.

“Mr. McCarthy: He does not say he does not know where it was, he does not know where it went.

“Q. I am asking you where the truck was when Mr. Fotopulos hit it after you hit Mr. Fotopulos, that is all I am asking you.

“A. That would only commit me. I do not know whether he hit the truck. He might have hit it before I hit him. [134]

“Q. You do not know what happened?

“A. I do not know. I hit him, that is all I know.

“Q. How is it you are so certain the right-hand corner of your truck hit the left-hand rear corner of the Fotopulos truck? Why are you so certain about that if you cannot remember anything else? Why do you remember that so distinctly?

(Deposition of C. A. Bailey.)

"A. That was my part of the accident. The other was not.

"Q. That is the way you want to leave that?

"A. Yes, sir.

"Q. Well, now, will you show us on this chart where you were, make the X on that line of travel where you were, put it wherever you were exactly when you first saw the Dodge truck.

"A. Approximately here, I would say (indicating).

"Q. Right there?

"A. I did not travel the length of my truck before I stopped.

"Q. Just answer the question. You have marked with an X where you first were when you first saw the Dodge truck. Is that correct?

"A. Yes, sir.

"Q. Will you take your pencil and show me with a line the line of travel of the Dodge truck after you first saw it? [135]

"A. Yes, sir.

"Mr. Makrauer: I would like to identify that.

"Mr. McCarthy: That is right, it should be identified.

"Q. Will you mark the defendant's line of travel?

"Mr. McCarthy: Mark it Y.

"Mr. Makrauer: Put a Y there.

"Mr. McCarthy: Put it over there where it is.

"Mr. Makrauer: Right here.

"Mr. McCarthy: Where he says the line of travel was on the Dodge truck.

(Deposition of C. A. Bailey.)

“Mr. Makrauer: I am talking about his line of traffic.

“Mr. McCarthy: I thought you identified that as X.

“Mr. Makrauer: That is the spot where he first saw the Dodge car.

“Mr. McCarthy: I suggest you mark the line of traffic of the Dodge truck, the Fotopulos truck, mark it Y.

“Mr. Makrauer: All right, mark it Y.

“Q. When you first saw the Dodge truck you were at the place marked X. Show us where the Dodge truck was with a Z.

“Mr. McCarthy: Let us get the question again.

“Mr. Makrauer: Will you show us where the Dodge truck was in its line of travel in the Dodge's line of travel when you were at the point marked X.

“Mr. McCarthy: Z.

“Q. Can you tell us how far it is from X to the point [136] where you hit the Dodge truck? Can you estimate that distance for us?

“A. Approximately 20 feet.

“Q. Could you tell us—

“A. More than that, I will say 35 feet.

“Q. Can you tell us how far it is from the point marked Z to the point where you hit the Dodge truck?

“A. No, I do not think I could. It is just approximate, probably 65 feet, 60 or 65.

(Deposition of C. A. Bailey.)

“Q. It was 30 feet from the point X to where you hit the Dodge truck?

“A. Approximately.

“Q. Sixty feet from where you first saw the Dodge truck to where you hit it?

“A. Just approximately, I would not say for sure.

“Q. You want to leave that that way?

“A. As approximate, yes, as far as the length goes, I have no estimate of it. That is something—

“Q. That is your best estimate?

“A. That is the best I can estimate.

“Q. And this car you cannot place anywhere now. If I am wrong in this, jump me, Mr. McCarthy, this car that was ahead of you in your line of traffic you cannot place anywhere now, was a truck and a half or two truck lengths ahead of you along the line of travel as you approached [137] the intersection? “A. Yes, sir.

“Q. Were there any cars in the line, the right-hand lane looking north next to the curb going along here? “A. I have no idea.

“Q. Did you see any cars?

“A. I was looking merely at what was happening here.

“Q. Was there anyone standing in the safety zone here? “A. No, sir, no one.

“Q. Not a soul? “A. Not a soul.

“Q. You testified that the center car tracks were a line of traffic. You do not mean that?

“A. I do.

(Deposition of C. A. Bailey.)

“Q. Do you mean it was a paved street with tracks inserted?

“A. Yes, sir.

“Q. There were no cars on it, were there, at the time of the accident?

“A. I would not say. There might be.

“Q. You do not know as a matter of fact whether it is used for travel or not, do you?

“A. I do. It is used for travel.

“Q. You are acquainted with Sgt. Hammond and Sg. Salazer?

“A. Fairly well. They worked with me. [138]

“Q. Right after the accident did you talk to them?

“A. No, merely that they signed my accident report and that was all.

“Q. They signed your accident report?

“A. Yes, sir.”

The Court: Counsel, I understand that in any event we will have to run tomorrow morning in the completion of this case.

Mr. Bucher: Yes, sir.

The Court: We will close the reading for to-day at the bottom of page 28, the last line, and the answer.

Mr. Bucher: Very well.

The Court: I would suggest, counsel, in the light of the conditions which Mr. Mitchell has outlined and the thought that if this case be continued, it would not be reached until some date next year, that we had better proceed with the deposition

(Deposition of C. A. Bailey.)

and the reading thereof as to the other gentlemen, Hammond—is that his name?

Mr. Bucher: Yes, Your Honor, Hammond.

The Court: Very well.

Mr. Scholz: Whatever Your Honor says on that.

Mr. Bucher: I will be away during January and February anyway, and this deposition was full and complete at the time.

Mr. Scholz: Would your Honor like to have my offer of this [139] statement of the doctor in support of my statement? The statement from the doctor at the Letterman General Hospital?

The Court: Well, I accept your statement for the record. There is no dispute of that?

Mr. Bucher: We made no objection to that at all.

The Court: And the medical reports which were referred to during the cross-examination of the doctors have been marked for identification?

Mr. Bucher: Only, yes.

Mr. Scholz: All I have is the copy of the medical reports which the Federal Bureau of Investigation made in their report here. These are exact copies.

The Court: Well, Mr. Scholz, during your examination of several doctors, you have referred to certain basic reports.

Mr. Scholz: That is right.

Mr. Bucher: Those are the pathological findings, I believe, if the Court please. That is what we are referring to.

(Deposition of C. A. Bailey.)

The Court: They were three in number?

Mr. Scholz: That is right, I have the copies of them here.

Mr. Bucher: I haven't seen those.

The Court: Counsel, you examined them during the recess?

Mr. Bucher: Oh, yes, I have seen those.

The Court: And you agree upon them, merely for the purpose of identification so that they are here and hereafter there will be no question concerning the record? [140]

Mr. Scholz: That is right.

Mr. Bucher. That is right.

The Court: Well, we will stand adjourned until tomorrow morning at 10:00 o'clock for the further trial of this case.

(Thereupon an adjournment was taken until

10:00 o'clock, December 5, 1947.) [141]

Friday, December 5, 1947, 10:00 o'clock a.m.

The Court: All right, counsel, you may proceed.

Mr. Bucher: May it please the Court, I believe at the close of yesterday's session we were at the bottom of page 28 and were reading the deposition of Charles Arthur Bailey.

The Court: Yes.

Mr. Bucher: With the Court's permission, I will proceed.

"Q. (Reading): Is this testimony you are giving here what you had in your accident report?

"A. Yes, sir.

(Deposition of C. A. Bailey.)

"Q. Have you seen that accident report since you filled it out?

"A. Yes, sir.

"Q. When did you last see it?

"A. About a week after it was made out.

"Q. You have not seen it since?

"A. No, sir.

"Q. You now tell us Sgt. Salazer and Sgt. Hammond signed that report which in substance contains the testimony you gave here today?

"A. Whether they signed it or gave me their names and I put their names on the report, I would not say. I know their names were on the report as witnesses.

"Q. Right after the accident occurred, Mr. Bailey, [142] what did you say to anyone?

"A. Nothing.

"Q. You testified you spoke to Mr. Fotopulos?

"A. Merely as a means of getting his name and address.

"Q. Did you say at that time your brakes were not working?

"A. I said they were working, in fine A-1 condition.

"Q. To whom did you say that?

"A. I did not tell anybody that in particular. I know it myself as the fact.

"Q. To whom did you tell the brakes were working fine?

"A. No one at the scene. That was put in my reports to the Provost Officer.

(Deposition of C. A. Bailey.)

“Q. Didn’t you see two men run out from the curbstone on the easterly side of Van Ness Avenue, run out toward the scene of the accident?

“A. No, sir, nobody approached the accident to my knowledge.

“Q. Immediately after the accident occurred?

“A. No, sir.

“Q. Can you tell us now, you do not know where Sgt. Salazer and Sgt. Hammond were sitting?

“A. No, sir. I know they were in the back of my truck, that is all I know.

“Q. Did you examine your car right after the accident? [143]

“A. Yes, sir.

“Q. Did you examine the Dodge truck?

“A. Yes, sir.

“Q. Will you tell us as exactly as you can the damage to the front end of your car immediately after the accident?

“A. Just about that much of the bumper had a crease in it (indicating).

“Q. That much. How much is that?

“A. About 15 inches.

“Q. 15 inches of your bumper had a crease in it?

“A. Yes, sir.

“Q. What part of the bumper?

“A. The extreme right end.

“Q. That is all the damage there was to your car?

“A. Yes, sir.

“Q. Did you examine the Dodge truck?

“A. Not too closely.

(Deposition of C. A. Bailey.)

“Q. Did you examine it? “A. Partially.

“Q. It was right there in front of you?

“A. Yes, sir.

“Q. What damage did you see on the Dodge truck and exactly where was it, will you tell us?

“A. There was no damage in sight. [144]

“You could see that the frame had been sprung. It had a sag in it. Other than that, I do not know.

“Q. Let this book represent a car.

“A. All right.

“Q. This is the front and this is the rear.

“A. Yes, sir.

“Q. I am holding the book as though I was going to read it. The front of the car is the front of the book. The rear of the car is the rear of the book. The left side of the car is the left side of the book and the right side of the car is the right side of the book?

“A. Yes, sir.

“Q. One thing you noticed about the Dodge truck, it had a sag in the middle. Take the book as though it were the car. The sag was a sort of sway back horse? “A. Yes, sir.

“Q. What did you notice about the rear of the Dodge truck? “A. Nothing.

“Q. Nothing at all? “A. No, sir.

“Q. No damage to the rear of it?

“A. There was hardly a mark on it.

“Q. On the rear of the car?

“A. Hardly a mark on it. [145]

“Q. Did you notice the front of the Dodge truck? “A. Yes, sir.

(Deposition of C. A. Bailey.)

“Q. What damage did you see to the front of it?

“A. The top part of the grille and the headlights were punched back.

“Q. Caved in? “A. Yes, sir.

“Q. The front of the car was caved in and the rear of the car had hardly a mark, no marks at all on it? “A. That is right.

“Q. No mark where your right hand it. There was hardly any visible damage where the front right part of your car hit the left rear part of the Dodge car? “A. That is right.

“Q. No damage to the mudguard of the Dodge car?

“A. It did not touch the mudguard. It touched the body, the left rear corner of the body. The fender was untouched.

“Q. Is this a fair description, the Dodge truck was bent in the middle like a sway back horse?

“A. Yes.

“Mr. McCarthy: We have had that three or four times.

“Q. You had no talk about this accident with Sgt. Salazer and Sgt. Hammond?

“A. No, sir. [146]

“Q. Never discussed it with them?

“A. No, sir.

“Q. Do you know whether they saw the accident? “A. Certainly they did.

“Q. They saw it?

“A. Yes, they made that statement themselves. They made the statement they saw the accident, yes, sir.

(Deposition of C. A. Bailey.)

“Q. You had no discussion after the accident with them about it.

“A. None whatsoever.

“Q. I would just like you to recall again how fast you were going just before the contact took place?

“A. Approximately 15 miles an hour.

“Q. Can you tell us how fast you were going when you were at the point X, which is where you first saw the Dodge car?

“A. About the same speed.

“Q. About the same speed, 15 miles an hour?

“A. Yes, sir.

“Q. How far would you say it was from the point X in your line of travel to the crosswalk, to the southerly line of the crosswalk on Bush Street?

“A. I would not estimate. I have no idea.

“Q. But whatever the distance was, where you place that car is a fair representation of where it was with reference [147] to the safety zone and the cross-walk? “A. Yes, sir.

“Mr. McCarthy: Just a minute. We are not going to be bound by it. I am objecting to the question, we are not going to be bound by the size of these cars he drew on the map with reference to the cross-walk.

“Mr. Makrauer: No, but I would like to put it this way, Mr. McCarthy.

“Q. The point X is placed approximately in the position with reference to the safety zone and cross-walk correctly, isn't it?

(Deposition of C. A. Bailey.)

“A. I would not say to scale because I do not know. As far as this goes, I could not tell you the wheel base length of my truck.

“Q. Is that a fair representation with reference to the safety zone and cross-walk where the cars were after the accident occurred, immediately after the accident?

“A. This is the position of these two vehicles here, yes.

“Q. With reference to the safety zone?

“A. Yes, sir.

“Q. X is where you first saw the Dodge car?

“A. Yes, sir.

“Q. From between the point X and the point of contact you did not slow down, did you, Mr. Bailey? [148]

“A. Yes, sir.

“Q. You told us you were going about the same speed, 15 miles an hour?

“A. You asked me——

“Mr. Makrauer: Repeat the question I asked him at that point about how fast he was going in cross-examination.

“(The question was read.)

“Q. So that between X and the point of contact you had not slowed down?

“A. In other words, you are trying to say——

“Q. Just a minute. In other words, between the point X and the point of actual contact in view of your answer, you did not slow down, did you?

“A. I did.

(Deposition of C. A. Bailey.)

“Q. Then which of these answers is correct?

“A. Your question, as he just read it, said how fast was I going at the point X and how fast was I going just before I hit him.

“Q. That is right. That is what I asked.

“A. I say the speed was the same between that time and when I hit him. I had applied my brakes.

“Q. The speed was the same?

“A. Certainly not.

“Q. You just said that?

“A. How can the speed be the same when a man applies [149] his brakes?

“Mr. McCarthy: Let him answer the question. You are arguing with him and inviting him to argue back with you.

“Q. You were going 15 miles an hour at the point marked X?

“Mr. McCarthy: We have that seven or eight times in the record, I think.

“Q. Were there any cars in this so-called third line of traffic?

“A. I do not know. I was not watching the third line of traffic.

“Q. As you approached Bush Street, did you see the traffic signal on the corner of Bush and Van Ness Avenue?

“A. I did not see it. I do not remember looking at it. I know it was **there**.

“Q. Did you see what color it was?

“A. No.

“Q. Did you notice at any point along this line

(Deposition of C. A. Bailey.)

of travel as you approach Bush Street whether the light was red or green?

“A. It is impossible to see the lights in San Francisco on Van Ness Avenue. You will find a lamppost sitting directly in back of the stop signs. It is a distance of about three feet. You can take my word or it can be checked. The lights cannot be seen until you approach [150] at least one-third of the distance of the block. It is all of that before you can see the light.

“Q. Putting it another way, how far from the intersection do you say you are before you can see that traffic light coming up Van Ness Avenue from Bush Street?

“A. About one-third of the block.

“Q. How many feet would that be, have you any idea?

“A. Going in the direction of Bush Street?

“Q. Going in the direction of Bush Street, of course?

“A. Not knowing the length of the block I would not be able to say.

“Q. You can see it in plenty of time to stop for it? “A. Yes, sir.

“Q. Did you see it?

“A. No. I was not looking at it. I was looking at this scene here, which was the immediate happening instead of stopping for a stop light.

“Q. Even with this scene here, weren't you near enough to see whether it was red or green?

(Deposition of C. A. Bailey.)

“A. If I had been looking, if I was to look at the stop light I would not have seen him.

“Q. Do you know whether it was red or green?

“A. No, I do not.

“Mr. Makrauer: That is all.”

Mr. Bucher: And that completes the cross-examination, if [151] the Court please.

The Court: Is there any redirect?

Mr. Bucher: There is a short redirect and short recross.

Mr. Scholz: If Your Honor please, on the re-direct examination questions were by Mr. McCarthy. (Reading)

“Q. (By Mr. McCarthy): My brother asked you to designate on Plaintiff’s Exhibit 3 by marking X where you were when you first saw the Fotopulos car. Is that right? “A. Yes, sir.

“Q. You marked in the east lane on your right Z where the Fotopulos car was when you first saw it with reference to X. Is that right?

“A. Yes, sir.

“Q. Now, according to the marks, X and Z on this chart at that time the Fotopulos car was over at the next line to your right? “A. Yes.

“Q. Between the point marked Y and the point marked B, he took the direction as indicated by Y on the chart. Is that right?” “A. Yes, sir.

“Q. So that he cut from your right or from the lane he was in, the one he was operating in according to the designations X and Z, cut over into the lane you were operating in? [152]

(Deposition of C. A. Bailey.)

“A. Yes, sir.

“Q. And gave no signal?

“A. That is right.

“Q. So that it is fair to say you could not avoid hitting him? “A. That is right.

“Mr. Makrauer: I object. It speaks for itself. I object to the last question, Mr. Commissioner, I object to the form of the question and the answer.”

The Court: Do you press the objection?

Mr. Bucher: Well, at this time we press the objection that the question is, so to say, “you could not avoid hitting him?” I think that question is objectionable.

The Court: What is the page number?

Mr. Bucher: That is page 37, toward the bottom of the page.

Mr. Scholz: Towards the second line from the bottom.

Mr. Bucher: In other words, it puts an opinion in the witness’ mouth.

The Court: Yes. The question, So that it is fair to say that you could not avoid hitting him?,—I will sustain the objection to that question, and the answer may be stricken.

Mr. Scholz: Redirect examination.

Mr. Bucher: This is short, Your Honor.

The Court: Mr. Reporter, did you make a note of that [153] ruling?

The Reporter: Yes, I did, Your Honor.

Mr. Bucher (Reading): “Q. (By Mr. Makrauer):

(Deposition of C. A. Bailey.)

But the cars immediately after the accident were in the position you saw them on the chart?

"A. Yes, sir.

"Q. Your car is A and the Dodge truck is B?

"A. Yes, sir.

"Q. Now, you are certain of that?

"A. Positive.

"Q. That when the cars came to rest they were in this position? "A. Yes, sir.

Mr. Bucher: May I ask, if the Court has that chart, the exhibit?

The Court: I have it in mind. I gave it to the Clerk.

Mr. Bucher: He refers to "this."

The Court: It has been marked in evidence.

Mr. Bucher: He refers to "this position."

The Court: I have the relative positions in mind.

Mr. Bucher: All right.

The Court: I know where the X is, and I know where the B and the A are.

Mr. Bucher: Very well, you know the angle.

The Court: And I recall there was an erasure in the [154] original instance, and then superimposed on that there was something else.

Mr. Bucher: That is correct.

The Court: I have the factors in mind.

Mr. Bucher: All right, I will proceed, then. (Reading):

"Q. Your truck here. This truck at the right-hand corner of your car up against the left rear of the Dodge truck? "A. That is right.

(Deposition of C. A. Bailey.)

“Q. And you tell us the car that had been ahead of you was nowhere in sight?

“A. He might be at the time, but he was not when I got out of my truck. It is evidence he was there at the time of the accident.

“Q. Then you do not know whether the Dodge truck hit the truck in front or not, do you?

“A. No, I do not know, to come right down to it.

“Mr. McCarthy: You know from the damage to the front.

“Mr. Makrauer: Just a minute. Do not answer until I hear this question.

“Mr. McCarthy: Do you know from having examined the Dodge truck as to whether or not the grille work in the front of the Dodge truck was damaged?

“The Witness: It was.

“Mr. Makrauer: That is all.

“Mr. McCarthy: That is all.” [155]

Mr. Scholz: If your Honor please, I have a stipulation on the deposition.

Mr. Bucher: We will waive that.

Mr. Scholz: I will offer that to make the record complete, if you think——

Mr. Bucher: Very well.

Mr. Scholz: Mr. Clerk, I will just offer that in stipulation.

Mr. Bucher: We will waive the reading of the stipulations.

The Court: This is the deposition of a passenger, one of the passengers taken on behalf of the

(Deposition of R. L. Hammond.)

defendant, the deposition of Roy Lee Hammond.
You may proceed, Mr. Scholz.

Mr. Scholz: Would your Honor wish me to read the preliminary?

The Court: No, it has been dispensed with.

Mr. Scholz: "ROY LEE HAMMOND,
called as a witness on behalf of defendant; sworn.

"Direct Examination"

The Court: Mr. Scholz, is it stipulated that the reporter may take only the objections?

Mr. Scholz: Yes, so stipulated.

Mr. Bucher: I will join in the stipulation, your Honor.

The Court: All right, proceed.

Mr. Scholz: "Mr. Scholz: Q. What is your name?

"A. Roy Lee Hammond. [156]

Q. What is your occupation? A. Army.

Q. You are a corporal in the Army of the United States of America? A. That's right.

Q. Were you in the Army on the 23rd day of December, 1946? A. Yes.

Q. Calling your attention to the morning of that day, were you riding in an Army vehicle going north on Van Ness Avenue? A. Yes.

"Mr. Scholz: Will it be stipulated that Van Ness Avenue generally runs north and south?

"Mr. Bucher: And Bush Street east and west.

"Mr. Scholz: Bush Street east and west.

Q. As this vehicle in which you were riding approached Bush Street, did anything happen?

(Deposition of R. L. Hammond.)

A. Yes.

Q. Would you state what happened?

A. A '36 Dodge pick-up came up beside us and cut his truck over into the lane we was in.

(The answer was read by the reporter.)

“Q. (Mr. Scholz): Was Van Ness Avenue at that time divided into lanes? A. Yes.

Q. There are two street car tracks on Van Ness Avenue? [157] A. Right.

Q. On each side of the street car tracks are there lanes? A. Two lanes on each side.

Q. Two lanes on each side. As this Army vehicle approached Bush Street on Van Ness Avenue, what lane was it traveling in?

A. It was in the left lane next to the safety zone.

Mr. Bucher: Mr. Scholz, why don't you have him draw a rough pencil diagram in connection with his testimony? Wouldn't it be easier if you prepared one and let him designate the lines and where he was? I think that would be easier.

Mr. Scholz: All right. That is pretty rough (referring to pencil diagram after preparation).

Mr. Bucher: That's all right. It will be better. It will expedite his testimony, I am sure.

Q. (Mr. Scholz): Is that the idea, there?

A. Yes. Those are street car tracks there (indicating).

Q. Yes. Those are street car tracks.

Mr. Bucher: Mark your lanes.

Mr. Scholz: That is west.

(Deposition of R. L. Hammond.)

Mr. Bucher: No, you are wrong. That should be east.

Mr. Scholz: Is that right?

The Witness: That's right. In other words, that would be in the west lane.

Q. (Mr. Scholz): Do you mean the lane nearest the [158] street car tracks? A. Yes.

Q. It was the lane on the right-hand side of Van Ness Avenue nearest to the street car tracks; is that correct? A. That's right.

Q. Now, as you left Sutter Street and traveled toward Bush Street, the next street, as you left Sutter Street going north about how fast was this vehicle traveling?"

The Court: "this vehicle," meaning the Army vehicle?

Mr. Scholz: That is right. (Reading)

"A. 15 miles an hour.

Q. About 15 miles as you left Sutter Street?

A. No. That is what we drove between the streets; we was just taking off——

Q. Listen to my question: As you left Sutter Street, the street before you came to Bush going north on Van Ness Avenue, about how fast was the Government vehicle traveling?

A. 10 miles an hour.

Q. As you left Sutter Street it was going 10 miles an hour?

A. Not when we left it, no. You are getting me confused. We had stopped at Sutter Street.

Q. You had stopped at Sutter Street?

(Deposition of R. L. Hammond.)

A. We started up from Sutter Street and between Sutter Street and Bush Street he got around 15 miles an hour. [159]

Q. Now, as you approached the intersection of Bush and Van Ness Avenue, did anything occur there outside of this car coming in front of you?

A. Yes. There was another truck setting in the east lane at the stop signal.

Q. There were stop signals at that intersection of Bush?"

The Court: Read that again, will you go back over that again? Just before the stop signal. Would you read a little bit more slowly?

Mr. Scholz: I am sorry.

The Court: It isn't any reflection on you, but there is a certain jargon and a monotony, not especially on your part, in reading depositions. We have to look out and read it just as slowly as you can.

Mr. Scholz: I appreciate that.

The Court: That applies to trying cases before juries as well as before a court.

Mr. Scholz (Continues reading): "Q. Now, as you approached the intersection of Bush and Van Ness Avenue, did anything occur there outside of this car coming in front of you?

A. Yes, There was another truck setting in the east lane at the stop signal.

Q. There were stop signals at that intersection of Bush? A. Yes. [160]

Q. And Van Ness Avenue? A. Yes.

Q. And the stop signal there said "Stop"; is that it? A. Yes.

(Deposition of R. L. Hammond.)

Q. Was there any car ahead of you, any vehicle ahead of you? When I say "ahead of you," I mean the vehicle that you were riding in.

A. You mean ahead of us in the lane we were in?

Q. Yes. A. No.

Q. Was there any vehicle in the lane that was nearest to the curb?

A. Yes, there was a truck.

Q. Did that truck stop at the stop signal?

A. Yes.

Q. As you approached this intersection was the speed of the Army vehicle decreased?

A. Yes.

Q. Why?

A. He was slowing down for the stop signal.

Q. As you slowed down for the stop signal did anything occur?

A. Yes. There was a '36 Dodge pick-up come up the east side of us and come over in our lane.

Q. In other words, this pick-up truck was traveling on the [161] lane nearest the curb?

A. Yes, the east side.

Q. And it cut in front of the Army vehicle?

A. Yes.

Q. At the time that that cut in front of the Army vehicle approximately how fast, if you recall it, was the Army vehicle traveling?

A. 10 miles an hour.

Q. Approximately how fast was this pick-up truck traveling that cut in front of the Army vehicle?

(Deposition of R. L. Hammond.)

A. Between 15 and twenty miles an hour.

Q. What did this truck that cut in ahead of the Army vehicle do?

A. Well, he cut in front of us; we hit his left rear of his truck.

Q. You say "we." You mean the Army vehicle in which you were riding hit his——

A. Left rear.

Q. Left rear——

A. With the right front bumper.

Q. With the right front bumper of——

A. Of the Army vehicle.

Mr. Bucher: Right front bumper, did he say?

Mr. Scholz: I think you said the right front bumper of the—— [162] A. Army vehicle.

Q. Army vehicle hit the left rear of the——

A. Dodge pick-up.

Q. Of the Dodge pick-up truck. A. Yes.

Q. I show you here a picture and ask you if you can identify that picture.

A. Yes; this is the Army truck.

Q. Was that the Army vehicle truck that you were riding in? A. Yes.

Q. Do you know whether that picture was taken before or after the accident?

A. It was taken after the accident.

Q. How do you know that?

A. This crease in the bumper.

Mr. Scholz: I will ask this be identified.

Mr. Bucher: Mr. Scholz, if you know that that

(Deposition of R. L. Hammond.)

was taken after the accident I will stipulate that it was.

Mr. Scholz: It was.

Mr. Bucher: All right. I will stipulate.

Mr. Scholz: The FBI took the picture."

The Court: When was the picture taken?

Mr. Scholz: It states in here, I think. Yes, 7/8/47. That is July 8, 1947.

Mr. Bucher: Six months—July 8th, pardon me.

Mr. Scholz: July the 8th.

The Court: 1947?

Mr. Scholz: 1947.

The Court: The accident happened when?

Mr. Scholz: December 23, 1946.

The Court: And this picture was taken in '47?

Mr. Scholz: It was taken in July of '47.

The Court: The truck has been in use all of that period of time?

Mr. Scholz: I don't know. I would presume so, but I don't know.

The Court: Did you stipulate to the admission of this photograph?

Mr. Bucher: I did stipulate as to the photograph, but the picture——

Mr. Scholz (Continuing reading):

"Mr. Bucher: Mr. Scholz, if you know that that was taken after the accident I will stipulate that it was.

Mr. Scholz: It was."

Mr. Bucher: The picture was taken after the accident. That was my stipulation.

(Deposition of R. L. Hammond.)

Mr. Scholz: I think that the testimony shows that the mark was a crease or a breaking of a little paint on the right-hand side, the right front side of the Army vehicle, and that it is still there. [164]

The Court: Well, you might agree on that later in the case. All right, you may proceed.

Mr. Scholz (reading):

“Mr. Bucher: Yes; I will stipulate that it was taken after.

Mr. Scholz: I offer that in evidence as Defendant's Exhibit A.

Mr. Bucher: No objection.

(The photograph was marked Defendant's Exhibit A.)

Q. (Mr. Scholz): You referred to the bumper. What is that bumper made of, do you know?

A. Steel.

Q. You say there was a mark or crease on this bumper? A. Yes.

Q. That is the right-hand side of the vehicle?

A. Yes.

Q. Looking from the car? A. Yes.

Mr. Bucher: Pardon me, Mr. Scholz. Can you establish from your record when that picture was taken?

Mr. Scholz: The picture was taken, according to the report given me, on 7/8/47; that would be July 8.

Mr. Bucher: July 8th of this year.

Mr. Scholz: 1947.

Q. (Mr. Bucher): Do you know of any other damage that [165] was done to that truck at that time, outside of that?”

(Deposition of R. L. Hammond.)

The Court: Who was answering the question put by Mr. Bucher?

Mr. Scholz: The witness. Mr. Bucher asked him the question: "Do you know of any other damage that was done to that truck at that time, outside of that?"

The Court: What has the witness been doing in the meantime? Has that been gone into?

Mr. Scholz: Pardon.

The Court: All right, proceed.

Mr. Scholz (reading):

"A. That is all the damage that was done to the Army vehicle.

"Q. Here is another one."

Mr. Scholz: I think that one refers——

The Court: This is the rear end of the Dodge?

Mr. Scholz: Bumper.

"Mr. Bucher: A Dodge truck?

Mr. Scholz: Yes."

Yes, bumper. (Reading):

Q. (Mr. Bucher): When was that taken?

Mr. Scholz: Same date.

Mr. Bucher: Had this been repaired?

Mr. Scholz: I don't know.

Mr. Bucher: Well, go ahead with your testimony. [166]

Mr. Scholz: This was taken 7/15/47. I just want him to identify the picture.

Mr. Bucher: If that is all, why, I will have no objection.

Q. (Mr. Scholz): I show you a picture of a

(Deposition of R. L. Hammond.)

pick-up truck and ask if you can identify that truck.

A. Yes; that is the Dodge pick-up truck that cut in front of us.

“Q. You not the fender appears to be quite heavily damaged.

Mr. Bucher: Wait a minute. I object to that, now, Mr. Scholz, inasmuch as there is no evidence in the record, and I submit there will be no evidence to the effect that any damage shown on the truck in this picture occurred at the time of the accident in question, assuming that the picture was taken in July of 1947, because the evidences will also show the truck had been fully repaired before that time.

Mr. Scholz: Well, I agree with you. We can stipulate that any damage on that truck was not a result of the accident.

Mr. Bucher: Yes; if that is what you mean.

Mr. Scholz: Yes, that is the stipulation. That is what I wanted to bring out.

Mr. Bucher: All right.

Mr. Scholz: I will offer that in evidence as Defendant's Exhibit B. [167]

(The photograph of Dodge pick-up truck was marked Defendant's Exhibit B.)

Q. (Mr. Scholz): About how far from the intersection was the Army vehicle when this truck cut in front of the Army vehicle?

A. 30 feet.

Mr. Bucher: Off the record.

(Deposition of R. L. Hammond.)

(Discussion off the record by direction of counsel.)

Q. (Mr. Scholz): You mean by that when the other truck started to cut in front, or cut in front?

A. When he started cutting in front.

Q. When he started to cut in front. Where were you in this truck?

A. I was sitting in the back next to the cab facing east."

The Court: Just a minute. Where was he seated in the cab?

Mr. Scholz: He was in the cab facing east; in other words, your Honor, the truck was going this way (indicating) and he was in the cab facing this side (indicating).

The Court: Yes, yes. Proceed.

Mr. Scholz: (Continues reading):

"Q. Did you see the stop signal? A. Yes.

Q. How did you see that?

A. I was looking over the cab.

Q. Where was——" [168]

The Court: What was that last, just before that?

"Q. (By Mr. Scholz, reading): How did you see that?"——

The Court: Yes.

"A. (Mr. Scholz): I was looking over the cab."

The Court: Cab, c-a-b?

Mr. Scholz: That is right. That is the way he says it here.

(Deposition of R. L. Hammond.)

The Court: Looking over the cab?

Mr. Scholz: I know what he meant.

The Court: What do you think he meant? This is off the record, Mr. Reporter.

(Off the record discussion.)

The Court: All right, proceed.

“Q. (By Mr. Scholz, reading): Where was the pick-up truck, what was the location of the pick-up truck when the Army vehicle hit it?

A. It was kind of across the lane, sitting kind of crossways.

Q. You are referring to the two lanes on the east side of the tracks? A. Yes, east side.

Q. At the time you hit it it was kind of——

A. Across the lane.

Q. Across the line. Was most of it in the lane nearest to—— A. West side.

Q. Nearest to the street car track?

A. Yes.

Mr. Bucher: You say was most of the truck——

Mr. Scholz: Most of the pick-up truck nearest—— A. Yes.

Q. Was any part of the pick-up truck in the lane nearest to the curb? A. Yes.

Q. Do you recall about how much?

A. I would say it was one-third.

Q. One-third was in the second lane?

A. Yes.

Q. And two-thirds was in the first lane?

A. Yes.

Q. By the first lane I mean the lane nearest the track. A. The curb?

(Deposition of R. L. Hammond.)

Q. No. A. The track, that is it.

Q. Is that correct?

A. Yes, that is it.

Q. When this pick-up truck cut in front of the Army vehicle was there any effort made to stop the Army vehicle more rapidly?

A. Yes. Sergeant Bailey, he threw the brake on as soon as he saw he was cutting in front of him.

Q. What happened to the truck that had stopped for the red light signal and that was in the lane nearest to the curb, do you know? [170]

A. Well, just as we hit this pick-up we knocked it ahead to the back of him, and as the light had changed for the go signal, so he just went off. Nobody ever did see him any more.

Q. You hit the pick-up truck and knocked him into the truck ahead of you? A. Yes.

Q. Was that with much force, or how?

A. No, it didn't hit him very hard; just hardly bumped it."

Mr. Scholz: I presume we can correct and say "It didn't hit him very hard"?"

Mr. Bucher: That is correct.

"A. (Mr. Scholz continues reading): No, it didn't hit him very hard; just hardly bumped it.

Q. This truck, then, that had stopped for the red light signal, just went right on?

A. Yes, he went on.

Q. Do you know who the driver of this pick-up truck was?

A. All I know, they called him Peter.

(Deposition of R. L. Hammond.)

Q. When the driver of the pick-up truck cut in front of the Army truck, did he give any signal that he was going to cut in? A. No, sir.

Q. Did you see the truck as it cut in front of the Army vehicle? [171] A. Yes.

Q. Immediately after the accident what happened? A. Well, I hurt my finger.

Mr. Bucher: I ask that that be stricken. Let him tell what did happen.

Mr. Scholz: Yes, State what happened. What happened immediately after the collision?

A. Well——

Q. Just state exactly what happened, as near as you remember.

A. I had hurt my finger, this finger right here, knocked it off, so I got down and get over to get a bandage to bandage it up, and Mr.—Peter, he went and called a fellow to come to fill out an accident report for him.

Mr. Bucher: Mr. Who? A. Peter.

Q. (Mr. Scholz): You mean the man that was known as Peter? A. Yes.

Q. You heard his name, Peter?

A. Yes. He went to get someone to fill out an accident report for him. When I got back——

Q. When you got back? A. Yes.

Q. Did you leave the scene of the accident?

A. Yes. [172]

Q. Where did you go?

A. There was a car parked over there and they saw my finger, and they had a Band-Aid in his car, and he called me over and I got it.

(Deposition of R. L. Hammond.)

Q. Do you know who that was?

A. No. So when I got back——

Q. No. Finish what you started to say.

A. Sergeant Bailey and Peter was there filling out the accident report. I went back to the back of the truck and motioned for traffic to come on around.

Q. Did the driver of the pick-up truck appear to be hurt? A. No, sir, he didn't.

Q. Did he complain of any hurts? A. No.

Q. Did he say anything?

A. Well, he was talking. He said, "Well, if you can——"

Mr. Bucher: Wait a minute. He asked you whether he did say anything? Answer that 'Yes' or 'No.' A. Yes.

Q. (Mr. Scholz): What did he say?

Mr. Bucher: I object to that as not part of the res gestae. That was after you had gone over and got the Band-Aid and came back."

Mr. Bucher: I waive the objection, if the Court please.

The Court: All right. [173]

Mr. Scholz: (Continues reading)

"The Witness: Yes.

Mr. Bucher: Go ahead and answer it over my objection. I just want to reserve my objection.

A. Well, he said the Army would fix his truck for him.

Mr. Bucher: What?

A. The Army would fix his truck; the only

(Deposition of R. L. Hammond.)

thing, it would be tied up until they did fix it for transportation, and without his truck. That is about all he said. I went back there.

Mr. Bucher: I withdraw my objection now.

Mr. Scholz: Do you recall anything else that he said? A. No, sir.

Q. I hand you herewith a picture and ask you if you can identify that.

A. Yes, that is Van Ness Avenue.

Q. Is that looking toward what street?

A. Bush.

Q. In other words, the intersection in the upper left-hand corner is Bush? A. Yes.

Q. According to my notes, that was taken on July 15, 1947.

Mr. Scholz: I offer that in evidence as Defendant's Exhibit C.

Q. (Mr. Scholz): What happened next?

A. Well, the wrecker came and got his truck, pulled it on [174] away and we went on to camp.

Q. You stated that he went to fill out an accident report.

A. He called someone to come and fill it out for him.

Q. Who is 'he'?

A. Peter, to my knowledge.

Q. The man you had known as Peter, the driver of the pick-up truck? A. Yes.

Q. Called somebody by telephone?

A. Yes.

Q. He went into a place and telephoned?

(Deposition of R. L. Hammond.)

A. Right on the corner of Bush and Van Ness, the building there, he walked in there and called.

Q. How do you know he called somebody there? Were you there?

A. I was out at the truck when he came back. That is what he said, he went and called a guy to fill out an accident report for him.

Q. Then what happened, if anything?

A. Well, I was back in the back, there, directing traffic, and they were up there talking; I don't know what they were saying or doing until the wrecking truck came and pulled his truck away.

Q. Then what happened?

A. And we went on into the Presidio, turned in the [175] accident report, and went up to see Captain Cline.

Mr. Scholz: That is all."

Mr. Bucher: Shall I proceed with the cross?

The Court: Yes.

Mr. Bucher: May I ask your Honor if you have before you the diagram that Sergeant Hammond made at the time? Because this is referred to in the cross-examination.

The Clerk: It is a yellow sheet, your Honor.

Mr. Bucher (reading): "Cross-Examination

"Q. (Mr. Bucher): How long have you been in the Army? A. I came in in 1943.

Q. That is when you enlisted? A. Yes.

Q. You have been in continuously ever since?

A. Yes.

Q. And are now? A. Yes.

(Deposition of R. L. Hammond.)

Q. Were you a corporal at the time of this accident? A. No; Pfc.

Q. Private first class? A. Yes.

Q. Where had you been that morning?

A. We had been down to Third and Townsend to pick up some groceries off a hospital train to take them back to the Presidio. [176]

Q. In the Army truck in which you were riding I assume there is a driver's seat crosswise with the body of the truck, in front, isn't there?

A. Yes.

Q. The driver, Bailey, was in that seat on the left-hand side? A. Yes.

Q. Is that right? A. Yes.

Q. You were sitting in the rear, to the rear of that seat, facing east? A. Yes.

Q. Were you sitting on a seat? A. Yes.

Q. Were you alone in the rear of the truck?

A. No; Sergeant Salazer was sitting right beside me.

Q. He was also facing east? A. What?

Q. You stopped at Sutter and Van Ness because of the stop signal there, did you?

A. Yes.

Q. The signal was "Stop" A. Yes.

Q. When you stopped at Sutter and Van Ness were there any other cars or trucks ahead of you at the "Stop" signal [177] in your lane?

A. Yes.

Q. How many?

A. Well, I couldn't say just how many there was, but there was some pulled off in front of us,

(Deposition of R. L. Hammond.)

and we pulled off and went up, but I didn't count them.

Q. Wait a minute.

A. I couldn't say just how many there was, but I know there was some. When we pulled off there was cars pulling off in front of us.

Q. You mean when you left the crossing on Sutter Street? A. Yes.

Q. Would you say there were two cars ahead of you in line?

A. No, I couldn't say there was for sure; I didn't count them. I wasn't paying very much attention to it.

Q. You didn't pay any attention? A. No.

Q. But as soon as the 'Go' signal at Sutter and Van Ness flashed green your truck immediately started forward toward Bush Street, didn't it?

A. Yes.

Q. When you approached the intersection of Bush and Van Ness you stopped for a red signal?

A. Yes.

Q. You are sure of that, now, are you?

A. Yes. [178]

Q. You don't know of your own knowledge whether those signals flash in unison, or not, do you—change in unison? A. No, I don't.

Q. Now, what was the fastest speed you were making between Sutter and Bush?

A. 15 miles per hour.

Q. Did you see the speedometer?

A. No, but he never got it out of second gear,

(Deposition of R. L. Hammond.)

and that's about all one of those trucks will do in second gear.

Q. Then you are basing your answer on the fact the truck won't go over 15 miles an hour in second gear?

A. No, I won't say it wouldn't go over that. It will go over that in second, but that is about what he was running, 15 miles per hour.

Q. That is your guess? A. Yes.

Q. But you did not see the speedometer?

A. No.

Q. Did the driver of your truck proceed in a straight line with reference to Van Ness as you approached the intersection of Van Ness and Bush?

A. Yes.

Q. You were not on an angle either way?

A. No.

Q. Is that right? [179] A. Right.

Q. Now, Corporal, will you mark on that diagram the position of the safety zone at the corner of Bush and Van Ness?

(Witness marks on the diagram.)

Q. Will you do this: Will you mark with the letter 'S' the location of the safety zone, and would you draw a line therefrom and mark it 'S'? I think that is the best way.

Mr. Scholz: Yes; indicate what you mean—This is off the record.

Mr. Bucher: Yes.

(Discussion off the record by the direction of counsel.)

(Deposition of R. L. Hammond.)

Q. (Mr. Bucher): Draw a line there and mark it 'S'. The line you have drawn is pointed toward the safety zone; is that right? Is the safety zone in either of the two lanes that you have described on Van Ness Avenue?

A. It is in the west lane going north.

Q. Isn't it true that the lane next to the street car track on Bush Street verges to a point and connects with the east lane when it reached the safety zone? A. Yes.

Q. That's right. Now, will you locate on the diagram the exact position of the truck that was already stopped at the intersection, the first truck?

A. It was back a little further than that. [180]

Q. That is what I thought. You had it out there a little too far.

Mr. Scholz: Hadn't you better designate to which you refer?

Mr. Bucher: This is off the record. Now, over here will you write the words 'curb line'? Now, will you locate the diagram, on the diagram, I mean, the position of the Dodge pick-up truck at the time it came to rest when it stopped?

A. That is as it was stopped after the accident?

A. Yes, after the accident.

Mr. Scholz: May I point out to you—make your figures more or less in conformity to the diagram. Don't make a truck as big as a block.

Mr. Bucher: No.

Mr. Scholz: You won't have room.

The Witness: They were both setting on an angle.

(Deposition of R. L. Hammond.)

Q. (Mr. Bucher): Will you draw a line like this at the Dodge truck, and will you mark that 'D', showing Dodge truck?

(Witness marks on diagram.)

Now, will you also draw a line from the Army truck and mark that 'A' for Army truck. Which way is east on that map?

A. East would be to the right, right here, this would be [181] east.

Q. Did the Dodge truck pass you?

A. Yes.

Q. On which side?

A. On the east side.

Q. On the east side, which would be your right side, wouldn't it? A. Yes.

Q. You are sure of that? A. Yes.

Q. That is what you said in your direct examination, but nevertheless you are satisfied the Dodge truck was in that position as you have drawn it on the diagram after the accident?

A. After the accident.

Q. Corporal, you testified before the County Coroner in this case, didn't you? A. Yes.

Q. On the 23rd of January, 1947?

A. Yes.

Q. You were sworn by the coroner there to testify and answer questions? A. Yes.

Q. I will ask you if this question was asked you:

'Q. Which way were you facing?

A. I was facing to the side of the truck.' '' [182]

(Deposition of R. L. Hammond.)

I said to the witness, "That is correct?"

The answer was, "That's correct."

Then I quote again from the Coroner's inquest:

"Q. Well, could you see what happened in front of you?"

A. I just looked over the cab and could see.

Q. And you saw his car pass you on which side?

A. On the left side. We were on the inside lane.

Q. Going north, and he passed on the left side of the Army truck? A. Yes.'

I will ask you if that is the testimony you gave before the Corner.

Mr. Scholz: Let him answer.

Mr. Bucher: Just answer the question.

Mr. Scholz: No, he can answer the question——

The Witness: Well, I gave them a statement but they could have made it wrong. I also said we was on the west lane, the inside lane next to the safety zone all the way down.

Q. (Mr. Bucher): Which do you call the west lane?

A. The one next to the street car track.

Q. You call that the west lane?

A. Yes.

Q. Is that what you call the inside lane or outside lane? [183]

A. That is the one I would call the inside lane, was nearest the street car.

Q. Go ahead. Did you give this testimony before the Coroner as I read it?

(Deposition of R. L. Hammond.)

A. I wouldn't swear I gave it as you read it there; they could have put something else. They might have misunderstood me by the way I said it.

Q. Do you remember whether you did say that?

A. No, I do not.

Q. Well, if that was your testimony before the Coroner, would you now say that you were mistaken at that time in stating that it passed you on the left side? A. Yes.

Q. You would say you were mistaken at that time? A. Yes.

Q. Would you say your memory is any better now than it was at that time? A. Yes.

Q. Is it?

A. Yes. At the time this accident happened I never gave it a thought that anything was ever going to come up about it, and just plumb forgot about it until about six months later I hear that he had died.

Q. But this testimony, Corporal, was given on the 23rd of January, which was one month after the accident; that is correct, isn't it? [184]

A. Yes.

Q. Corporal, at that time you were of the opinion that he passed on the left side?

Mr. Scholz: Just a minute. He didn't so state.

Mr. Bucher: No. I can cross-examine on that, though.

Mr. Scholz: But that is a misstatement of what he testified to. He did not testify that he was of that opinion. He testified that they may have made

(Deposition of R. L. Hammond.)

a mistake at the time or he may have made a misstatement that they passed him on the——

The Witness: Right-hand side, east.

Mr. Scholz: On the east side.

Mr. Bucher: Mr. Scholz, I think you will agree with me that the usual procedure is for you to make your objection and then if your objection is sustained the answer can be ruled out, but I think he should answer the question.

Mr. Scholz: Yes, but I don't think you can say he stated this or that when he didn't state that.

Q. (Mr. Bucher): You did state that you saw the car pass you on the left side; isn't that true?

Mr. Scholz: I make the objection to that on the ground that he did not state in his testimony today.

Mr. Bucher: No, but I mean——

Mr. Scholz: And on the ground that he stated that he [185] didn't remember what he testified before the Coroner's Inquest."

The Court: Well, is there a formal objection in there, or what is it? Is it merely a running objection?

Mr. Scholz: It is not a formal.

The Court: All right.

Mr. Bucher (reading):

"Q. (Mr. Bucher): You have no recollection of what you testified to before the Coroner: is that correct?

A. I couldn't tell you what I told him over there.

Q. Do you know whether what you told them at that time was true? A. I couldn't say.

(Deposition of R. L. Hammond.)

Q. You don't know. Well, do you know definitely that what you are testifying to today is true? A. Yes.

Q. But you don't know whether it was true at that time. Did you examine the Dodge truck, pick-up truck, in the front after the accident?

A. I just walked around it, is all.

Q. But you saw how badly it was damaged, didn't you? A. Yes.

Q. What part of the front of the Dodge truck was damaged?

A. The grille was pushed back in.

Q. The middle of the grille, wasn't it? [186]

A. Yes.

Q. Was pushed back? A. Yes.

Q. Was that true? A. Yes.

Q. Isn't it also true that the center of the rear of the Dodge truck was pushed in?

A. Yes, the center could have been damaged; we hit it about right on the corner, the left rear, not quite center, but it could have bent—the center could have been pressed in.

Q. Isn't it true that the Army truck hit the Dodge truck right in the very center of the rear?

A. No.

Q. You are positive of that?

A. I am sure, for if we would hit him in the center our front bumper would be hurt, for one reason.

Q. Is that the reason you answer the question in that manner?

(Deposition of R. L. Hammond.)

A. No, that is not the reason.

Q. Do you know whether the right side or right rear part of the Dodge truck was damaged at all?

A. No, sir, it was not, to my knowledge.

Q. You are sure of that? A. Yes.

Q. When the Dodge truck cut over in front of the Army truck [187] did he continue in that same direction until he was hit? A. Yes.

Q. Did the driver of the Dodge truck after he cut in front of you on an angle turn back to the other angle?

A. As he cut in front of us he was so close on to this other truck, as he snapped on the brake and the time we hit him, it knocked him on an angle.

Q. You knocked him——

A. We knocked his truck at an angle; he never did get clean in the lane we was driving in.

Q. You knocked him then in what angle? Come here.

Mr. Scholz: How will we have a record of that.

Mr. Bucher: If he will draw it we will.

The Witness: You want me to draw you an angle of how he was setting after the accident; is that right?

Mr. Bucher: Yes; the Dodge truck only now.

A. I will start at the rear of it. Setting something about like that.

Q. Then you struck him on the left rear end, did you? A. Yes.

(Deposition of R. L. Hammond.)

Q. And he was then on an angle looking toward the northwest, wasn't he? A. Yes.

Q. And after you hit him you mean to say that the position of his truck changed so he was then resting at an angle [188] and looking toward the northeast? A. Yes.

Q. Sure of that? A. Yes.

Q. Did he hit the truck ahead of him before you struck the Dodge pick-up? Did the driver of the Dodge pick-up hit the car ahead of him before you struck the Dodge?

A. Not to my knowledge, no.

Q. Then is it your opinion that you struck the Dodge car and forced him into striking the car ahead of him? A. Yes.

Q. That is right? A. Yes.

Q. You are positive now that the Dodge truck changed its position and you say he had not come to a stop there? A. No.

Q. He was still moving? A. Still moving.

Q. You struck him on the left corner and he changed his position so he then faced toward the northeast? A. Yes.

Q. Sure of that?

A. Yes. Just like the book setting there. You can take that book and hit it over there and see it facing that was (indicating). [189]

Q. Will you mark this white slip with your name? You did not offer that in evidence, did you?

Mr. Scholz: If you wish to offer that in evidence as Plaintiffs' Exhibit No. 1, yourself, and the other as Plaintiffs' Exhibit 2.

(Deposition of R. L. Hammond.)

Mr. Bucher: That is what I am going to do. We offer that in evidence as Plaintiffs' Exhibit No. 1.

"Q. Will you also sign this yellow sheet?

We offer the yellow sheet as Plaintiffs' Exhibit 2.

(The pencil diagram on white paper was marked Plaintiffs' Exhibit 1; the pencil diagram on the yellow paper was marked Plaintiffs' Exhibit 2.)

Q. (Mr. Bucher): You may have answered this question, Corporal, but if you have I have forgotten. What was the highest speed you made between Sutter and Bush Streets?

A. Approximately 15 miles an hour.

Q. Oh, I remember that you said that.

Were you talking to the other soldier during that time before the accident? A. Yes

Q. You weren't paying much attention to the traffic, were you? A. Not too much, no.

Q. Were there any people in the safety zone at that time, do you know?

A. I am not sure, but as I remember I think there were. [190]

Q. There were?

A. I wouldn't say for sure. I wouldn't swear to it. To the best of my recollection I saw somebody.

Q. If what you say is correct, when the Dodge truck attempted to cut in front of you going in a northwesterly direction—that's right, isn't it?

(Deposition of R. L. Hammond.)

A. Yes.

Q. It was then going toward the safety zone, wasn't it? A. Yes.

Q. Do you know whether it had reached the safety zone, whether any part of the truck was in the safety zone before you struck it?

A. No, it was not in the safety zone. It never did get that far over the line.

Q. You are positive also that when you came to rest after the accident your truck was in the inside lane next to the street car tracks; is that right?

A. It was setting on kind of an angle.

Q. Your truck was at an angle?

A. Yes, our truck was at an angle, too.

Q. Which direction was your truck pointing, northwest or northeast?

A. Ours was pointing northeast.

Mr. Scholz: At what time was this?

The Witness: 9:30 in the morning. [191]

Mr. Scholz: No.

The Witness: Oh, that is after the accident.

Mr. Bucher: When he came to rest.

A. After it all happened?

Q. Then the driver of the Army truck turned his truck toward the northeast, is that right, just before you struck?

A. I couldn't say about that for you can be driving along and apply your brake and sometimes your car will automatically turn this way and one brake will catch before the other.

(Deposition of R. L. Hammond.)

Q. You are also positive about the third truck; by that I mean the first truck in line up at the stop signal was in the outside or the east lane; is that right? A. Yes.

Q. How much of your truck, the Army truck, would you say was in the east lane after the accident?

A. Just a little of the front of it. About, I would say——

Q. 10 per cent of it?

Mr. Scholz: Let him answer.

Mr. Bucher: Well, I am asking.

The Witness: About one-third of the front.

Q. (Mr. Bucher): About one-third of the front? A. Yes.

Q. In other words, just about the wheels?

A. Just about the wheel part of it—about like from here [192] over there, was setting there.

Q. Corporal Hammond, since the testimony before the Coroner in this case, have you discussed this case with anyone?

A. Two FBI's came out to see me and it hasn't been too long ago, and I talked with them, and Mr. Scholz came out and discussed it.

Q. When you discussed the matter with the FBI agents did they tell you their opinion as to the position of the three trucks? A. No.

Q. Did you tell them at that time that the Dodge truck passed you on the left side?

A. No. I told them it passed me on the right side.

(Deposition of R. L. Hammond.)

Q. You did?

A. Yes. Also they had a diagram drawn up on this truck that was supposed to be—that was sitting at Bush, the stop signal there, in the other lane, and they made a misstatement, and I called it to their attention, and they were talking to me, and they put it in the east lane in place of the west lane.

Q. Now, if it should appear from the testimony of any witness that the three trucks after the accident were all in the same lane, and all in the inside lane next to the street car track, you would say that that was a mistake and that is not true, wouldn't you? [193]

A. Yes.

Mr. Scholz: I object on the ground it is argumentative."

The Court: Is that objection pressed?

Mr. Scholz: Yes, it is objectionable, your Honor.

The Court: I will sustain the objection.

Mr. Bucher (reading): "Q. (Mr. Bucher): How fast was the Dodge truck going, in your opinion, when it cut over in front of you?

A. I would say 20 miles an hour.

Q. 20 miles an hour? A. Yes.

Q. Of course, you don't know whether he was going to go up Bush Street, or not, do you?

A. No. I don't know what he had in mind to do.

Q. You don't know whether the driver of the Dodge pick-up truck was in second gear or not, do you?

A. No, sir, I do not.

Q. But the driver of your car was?

A. Yes.

(Deposition of R. L. Hammond.)

Q. When did he get into second gear?

A. Just as it left from Sutter and Van Ness he pulled in low gear and threw it in second gear and kept it in second on up to there.

Q. Have you talked this case over with Sergeant Salazer recently? [194]

A. No, I haven't saw him. He left right after the accident and went to a camp in New Jersey, and from there overseas.

Q. Have you seen Mr. Bailey since the accident?

A. No. He was discharged right after that, and I haven't saw him since.

Q. Not since the accident involved in this case?

A. That's right.

Mr. Bucher: I think that is all."

Mr. Bucher: I think that is all. Thank you, your Honor.

Mr. Scholz: I will read the redirect, if your Honor please.

(Reading): "Redirect Examination

"Q. (Mr. Scholz): Corporal, you stated that the Dodge pick-up truck, the truck that cut in front of the Army vehicle, was still moving when the Army vehicle hit it?

A. To my knowledge, yes.

Q. Did the Dodge pick-up truck hit the car ahead of it with much force?

A. Not very much, no.

Mr. Bucher: I object to that as calling for an opinion and conclusion of the witness."

The Court: Overruled.

(Deposition of R. L. Hammond.)

Mr. Scholz (reading):

“Q. (Mr. Scholz): Do you know?

A. I couldn't say. I know it hit it, but not too hard, it didn't seem to me. I didn't get very much of a jar [195] and I was sitting in the back.

Q. The truck which had stopped for the stop signal, and which the Dodge pick-up hit, did it go right off without stopping? A. Yes.

Q. After the signal changed? A. Yes.

Q. The driver didn't get out, did he?

A. No.

Q. Do you know what I mean by 'drawn to scale,' a map drawn to scale? A. Yes.

Q. These plaintiffs' exhibits, 1 and 2, this is not drawn to scale, is it? A. No.

A. And the size of the trucks are not drawn to scale, are they? A. No.

Q. And the position of the trucks on Plaintiffs' Exhibit No. 1 on this white paper which you have designated as D and A are the position of the trucks after the accident?

A. After the accident, yes.

Q. You testified, I believe, that the front part of the Army vehicle that was over the white line separating the lane between the curb line and the street car track was just the wheel? [196]

A. Yes, just the right front wheel.

Q. How much of the right front of the truck was over that line?

Mr. Bucher: You mean the Dodge truck?

Mr. Scholz: Of the Dodge truck, that's right.

(Deposition of R. L. Hammond.)

A. The right front?

Q. Yes.

A. I would say it was approximately one-third of it, of the front.

Q. Of the front? A. Yes.

Q. You mean about the wheel? A. Yes.

Q. Or more?

A. Just a little more than the wheel. I will show you on here.

Q. All right; referring to Defendant's Exhibit A, you have indicated on there a spot showing the right front wheel and a few inches of the dashboard. A. Yes, the bumper.

Q. How many inches of the dashboard would you say? A. Two feet.

Q. That was a part of the Dodge pick-up which was resting over the curb line at the time after the accident? A. Yes. [197]

Q. By 'over the curb line,' I mean over the line separating the two lanes. A. Yes.

Q. Where was the rear of the Dodge pick-up truck, was that all in the lane nearest to the street car track, or was any part of that over that line and in the lane nearest to the curb?

A. To my knowledge, the right rear wheel of the Dodge was sitting about two inches on the east side of the line.

Mr. Scholz: That is all."

Mr. Bucher: The recross-examination is very brief, your Honor (reading):

(Deposition of R. L. Hammond.)

Recross-Examination

“Q. (Mr. Bucher): The only way that you can tell what part of the Army truck struck the Dodge truck is by the mark on the front fender of the Army truck; isn't that true? A. Yes.

Q. In other words, when you got out of the vehicle you saw a mark on the front bumper; isn't that true? A. Yes.

Q. And you judged from that mark that that was the part that struck the Dodge; is that right?

A. Yes.

Q. But you don't know whether that mark was there before, [198] or not, do you?

A. I know it was not there before.

Q. Had you examined the Army truck before?

A. Yes. I had rode it every day for quite some time.

Q. Well, how long?

A. Approximately two months.

Q. You know that that mark was not there before? A. Yes.

Q. Sure of that? A. Yes.

Mr. Bucher: That is all.

Mr. Scholz: That is all.”

Mr. Bucher: And that completes the reading of the deposition.

The Court: Is there a photograph in evidence? Do you have the depositions in evidence respectively?

Mr. Scholz: Yes, your Honor.

Mr. Bucher: Yes, your Honor.

The Court: It may be admitted in evidence. Do you have a photograph of the Army truck in the over-all sense?

Mr. Bucher: We have not.

The Court: Can you agree upon a stipulation as to the form of the truck, itself? Otherwise I will require a photograph.

Mr. Bucher: As to the type of body? I think we can. [199]

The Court: All right, we will take a recess, and in the meantime you can agree on that.

Mr. Bucher: I might remind your Honor that Mr. Scholz was to identify those medical reports.

The Court: If you have a photograph of the over-all picture, I notice in the deposition that only the fore part of the truck is taken, Exhibit A.

Mr. Scholz: I could procure a picture, if your Honor wishes.

The Court: Exhibit A in the deposition of Roy Hammond, it appears that the fore part of the truck is represented, not the body structure, itself. It shows just the fore part, including the hood, the fender, the two front wheels, but excludes the body structure, proper.

Mr. Bucher: We can procure one, depicting the truck at that time.

The Court: Depicting the truck at that time, you say?

Mr. Bucher: Yes, your Honor.

The Court: Very well, we will take a short recess.

(Recess.)

Mr. Bucher: If the Court please, counsel for the defense and I, with your Honor's permission, have agreed that we will obtain photographs of the Army truck in different positions, showing the entire truck, which is now available, and at the Presidio, I believe. [200]

Mr. Scholz: That is right.

Mr. Bucher: And we will submit them in evidence to your Honor.

Mr. Scholz: If your Honor please, we will rest, although I understand you want—it is stipulated that, subject to the approval of your Honor, of course, that we may be able to secure the testimony of Roy Lee Hammond before the Coroner's Inquest, and that may be read into the record, if that is agreeable to your Honor.

The Court: What is the purpose?

Mr. Bucher: For impeachment purposes solely.

Mr. Scholz: And then also the testimony of Harry Failor. Do you want to——

Mr. Bucher: Well, I guess you are still on the defense, are you not?

The Court: One moment. Do you stipulate, Counsel, that the testimony of Roy Lee Hammond, given before the Coroner's Jury and Inquest, having been taken in the City and County on the date mentioned, be read into the record on this trial?

Mr. Bucher: Yes, your Honor.

The Court: The whole testimony before the Coroner?

Mr. Bucher: No, the testimony of Roy Hammond.

The Court: Yes.

Mr. Bucher: That is all we want.

The Court: Well, you did undertake to impeach him [201] specifically on the subject-matter of the testimony before the Coroner, did you not?

Mr. Bucher: Yes, we did, your Honor.

The Court: And you pointed out to him specifically the testimony you had in mind?

Mr. Bucher: Yes, your Honor.

The Court: And made it appropriate?

Mr. Bucher: Yes, your Honor.

The Court: Now, this wholesale showing, burdening the record with the whole testimony of Hammond before the Coroner's inquest, is rather unusual.

Mr. Bucher: It was the only way.

The Court: I find no basis for it. What is your basis for that procedure.

Mr. Bucher: May I express myself to the Court in this position?

The Court: Yes.

Mr. Bucher: The only way, or the proper way for us to complete the impeachment of the witness is to call the reporter who heard his testimony before the coroner and who could testify as to it.

The Court: He has already admitted that he

made those statements and gave that certain testimony before the coroner.

Mr. Bucher: Very well.

The Court: He has admitted that. What purpose is going [202] to be served by this?

Mr. Bucher: Well, I will withdraw my request.

The Court: Well, that rule prevailed years ago, when we had to call in the reporter and demonstrate that the reporter took notes. But these records are official records now.

Mr. Bucher: That is true.

The Court: You see, what purpose will be served by it, I am not going to foreclose it, but I don't see the purpose of it. Do you understand? Are you sure I understand your inquiry, or am I just answering myself?

Mr. Bucher: No, you are answering my inquiry, your Honor.

The Court: You laid the foundation, you directed his attention to the testimony, and he answered as he did answer.

Mr. Bucher: Very well.

The Court: Now, Mr. Scholz?

Mr. Scholz: I think that is more or less correct, your Honor. I concur with you. I thought it would not be admissible, but I had no objection. Any evidence your Honor wanted to hear was perfectly agreeable with me.

The Court: I am willing to hear it.

Mr. Scholz: I think your Honor is right, but as I say I have no objection to it. I think we will

close, except that we will have those photographs taken, and I will have a copy made of the report referred to, the medical reports—the pathological and so on. They will be submitted to the Court. [204] Do you want to offer that in evidence, the diagram there?

Mr. Bucher: Which diagram?

Mr. Scholz: That one, there (indicating).

Mr. Bucher: Well, I think the diagram showing the positions as related possibly should go in with the other exhibit, if the Court please.

The Court: Well, it has been marked in evidence, has it?

The Clerk: It has not, your Honor.

The Court: It should be marked.

Mr. Scholz: It has not yet been offered in evidence. It should be marked. Have it marked appropriately as Plaintiffs' Exhibit, or defendant's, as it may appear.

Mr. Bucher: We offered it originally, so it may be marked as our exhibit.

The Clerk: Marked Plaintiffs' 4 in evidence.

(Diagram referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 4.)

The Court: Now, a stipulation was entered into with respect to certain factual matters. I think that stipulation should be read into the record. Otherwise it will not be reflected in the official record.

Mr. Bucher: In that case, I think it should be

read. With the Court's permission, I will read the stipulation entered into between the parties, omitting the caption. (Reading.)

"It is hereby stipulated by and between the parties [204] hereto that the following statements may be accepted as true without affirmative proof, and may be considered as evidence in the trial of the above action:

"1. That at the time of the accident sued upon in this cause, Peter Fotopulos was driving the Dodge pickup truck involved in the accident.

"2. That he was then of the age of 49 years, and his life expectancy on December 23, 1946, was 23.36 years.

"3. That he was married to the plaintiff and guardian ad litem on November 24, 1935.

"4. That he left surviving him his widow, aged 29 years, and two children, Thomas F. Fotopulos, aged 10 years, and *John F.* Fotopulos, aged 9 years.

"5. That Peter Fotopulos died on January 10, 1947.

"6. That Peter Fotopulos, at the time of the accident sued upon herein, was the sole owner of the business known as the 'P. F. Casing Company.'

"7. That the net earnings of Peter Fotopulos upon which he paid Federal income taxes were as follows: For the year 1943, \$7872.55. For the year 1945, \$15,195.92. For the year 1946, \$18,574.76.

"8. That plaintiff, who is the widow of Peter Fotopulos, has no property or income separate and apart from her community interest."

Mr. Scholz: We rest, your Honor. [205]

(Defendant rests.)

The Court: I would like to ask the plaintiff, the widow, several questions.

MRS. DIAMOND FOTOPULOS,

recalled, having been previously sworn, testified as follows:

The Court: You have been sworn heretofore. You may be seated. May I ask you these questions:

Q. How long had your deceased husband been engaged in the particular business that has been referred to? A. Oh, over 20 years.

Q. In the casing business?

A. Yes, over 20 years.

Q. And when you married him, he was engaged in that business? A. Yes.

Q. And did he employ men in the course of the manufacture of the casings?

A. He did, one.

Q. One man?

A. Not all the time, just when he needed help. Mostly he employed a woman to do his, making the casings.

Q. Where was the factory located?

A. 1131 Shafter Avenue.

Q. San Bruno? A. No, San Francisco.

Q. San Francisco? A. Yes, sir.

Q. I see.

Mr. Bucher: May I interrupt, if your Honor please? I think that should be South San Francisco.

(Testimony of Mrs. Diamond Fotopulos.)

The Witness: No, San Francisco.

Mr. Bucher: I was mistaken.

The Court: Q. I would like to know, did that consist of a regular factory, or was it just a loft? Tell me about it in your own words.

A. Well, we would make sausage casings.

Q. I know, was it a big building, a little building? Did you rent it, or did you own it?

A. Yes, we owned it. I own it now.

Q. And was it located—

A. At 1131 Shafter Avenue, in San Francisco.

Q. You worked with your husband, did you?

A. Yes.

Q. In the manufacture of these casings?

A. No.

Q. What did you do?

A. Just once in a while I helped him, if he would have to leave, to go out, I would take telephone calls.

Q. He undertook to make the deliveries?

A. Yes. He delivered the casings, clean the casings. [207]

Q. These earnings in 1943, did you keep the books?

A. No, we had an accountant keep the books.

Q. I noticed the earnings in 1943 were \$7000, while he earned up to \$15,000 the following years. How do you account for that?

A. Well, business was good.

Q. Business was better? A. Yes.

Q. And then it increased?

(Testimony of Mrs. Diamond Fotopulos.)

A. Oh, he had a partner then.

Q. When?

A. When was that? 1945, I think.

The Court: Will you read that again, Counsel? There was quite a disparity between the 1943 income, with \$7000, and then the one which went up to \$15,000. Now, that stipulation does not reflect any mean average earnings to me.

Mr. Bucher: No, but may I call the Court's attention to this fact, that the year 1944 is lacking. We have no report for that.

The Court: Yes.

Mr. Bucher: I talked to the tax collector's office about that. There was an income tax return filed, undoubtedly, but I talked with the accountant who made it up for Mr. Fotopulos during these years, and he advised me that he had no copy of the return made for the year 1944. I don't know whether Mr. Scholz has obtained that year, or not, but the accountant did [208] verify the other two or three years. In other words, 1943 was \$7800, and 1945 was \$15,000. There were two years elapsed in there.

Mr. Scholz: If your Honor please, in checking the income, I received a photostatic copy of the report for the year 1944. If it will be of any assistance to the Court, I would like to offer that in evidence.

Mr. Bucher: What does it show, Mr. Scholz?

Mr. Scholz: It shows—

The Court: Was this a joint return, or an

(Testimony of Mrs. Diamond Fotopulos.)

individual return, or what? Who was it filed by, was it a co-partnership return?

Mr. Scholz: The name is Peter—and there is something scratched out. It says Fotopulos.

The Court: Yes.

Mr. Scholz: And the address is 209 California Avenue, South San Francisco. The amount shown on it is \$12,460 for the year 1944. In other words, it went from \$8000 to \$12,000, from \$12,000 to \$15,000, then from \$15,000 to \$18,000.

Mr. Bucher: That is the only method we had. I expected to call the accountant, but after discussing the matter, in order to expedite this trial, we decided against it.

The Court: Well, the question of expedition is not of paramount importance to me. The question of getting facts is more important. [209]

Mr. Bucher: I appreciate that.

The Court: I am not interested in expedition as such.

Mr. Bucher: Mrs. Fotopulos advised me in the beginning that she knew nothing about the books of the company, as I say, and all of the books were audited by an accountant; he was and is available.

Mr. Scholz: This may assist the Court. I didn't offer it in evidence because I was not sure whether it was admissible, but I may say that it is a photostat of the original. I might say this aside to the Court: The report which I have states that this business was being carried on in a medium-sized frame building with very little equipment, other

(Testimony of Mrs. Diamond Fotopulos.)

than one machine to clean the casings, and a number of flat tables, where the casings are sorted and packaged. It is observed that the casings were kept in salt, which would apparently account for the brine being on the bottom of the truck. That is the report of the FBI, which is all I know.

The Court: Well, Mr. Bucher, do you care to examine the lady further on this subject? That is, as to the general purport of my original inquiry? Do you know what that is all about?

Mr. Bucher: May I ask, with the permission of the Court—

Q. Mrs. Fotopulos, prior to your husband's death, you and your husband owned certain properties, didn't you, besides the property where the casing business was maintained? [210]

A. Yes.

Q. Now, what did that other property consist of that you owned?

A. Well, it was a two-story flat in South San Francisco, and the home we live in now. It is a private home. And in San Francisco here where I live now is a two-story flat.

Q. Now, you owned your own home in South San Francisco where you resided, is that correct?

A. Yes.

Q. Then you owned a two-flat building in South San Francisco? A. Yes.

Q. That was rented out? A. Yes.

Q. And what was the rental that you received from that location?

(Testimony of Mrs. Diamond Fotopulos.)

A. Fifty-seven fifty for the two flats together.

Q. For the two flats together? A. Yes.

Q. That was unfurnished? A. Yes.

Q. And you still own that, do you not?

A. Yes.

Q. Now, the flats in San Francisco that you own, was that a two-flat building?

A. Yes, it is rented by one person. He has a cleaning business downstairs and he lives upstairs.

Q. And what does that rent for?

A. Eighty-five.

Q. Eighty-five? A. Yes.

Q. Then your returns from the real estate that you own amount to, roughly, around \$400 a month, is that right?

A. Well, I guess about that much.

Q. And did you, or your husband, have any other income except the income from the sausage business? A. No, that is all.

Q. That is all of the income that you had?

A. Yes.

Q. Now, during the year 1944, I believe you stated to the Court that your husband had a partner? A. Yes.

Q. 1943 was that, or was it 1944?

A. I don't remember exactly.

Q. Who was the partner?

A. Arthur Bianchi.

Q. And how long had they been in partnership?

A. Oh, I think it was in 1936 when they started together.

(Testimony of Mrs. Diamond Fotopulos.)

Q. From the time they started? A. Yes.

Q. Well, then, did your husband buy out his partner's interest? A. Yes, he did. [212]

Q. When was that, do you know?

A. I don't remember exactly.

Q. You don't know what year it was?

A. No.

Q. Do you know how long it was before his death? A. Oh, about two or three years.

Q. About two or three years. And he bought his partner's interest out and then from then on he owned the entire business, is that true?

A. Yes, that is true. [212-a]

Q. Now, Mrs. Fotopulos, during the year prior to your husband's death, as I understand your testimony, he operated the business himself with a helper and then one employee? A. Yes.

Q. And you say sometimes you answered the telephone in the office?

A. Yes, that wasn't often, though—just when he had to go out and didn't have anyone left in the shop.

Q. Now, did he go out and take the orders for the casings? A. Yes.

Q. And he made deliveries of the casings?

A. Yes.

Q. And who did the processing or the cleaning of the casings? A. He did.

Q. Did his helper assist in that?

A. His helper just selected them.

Q. Just what?

(Testimony of Mrs. Diamond Fotopulos.)

A. Selected the casings in the different sizes. There were different sizes and they salt them and bunch them.

Q. And he sorted them—is that what you mean by selecting?

A. Yes, it was a lady that usually did that.

Q. Oh, it was a lady, this employee?

A. Yes.

Mr. Bucher: That is all, if the Court please.

The Court: Q. You were married when and where? [213]

A. San Francisco, 1935.

Q. In 1935? A. November 24.

Q. And your husband then was engaged in the same business? A. Yes.

The Court: That is all I wanted to know.

Mr. Bucher: That is all.

Do you rest?

Mr. Scholz: We rest.

The Court: Do you have any questions, Mr. Scholz?

Mr. Scholz: No, your Honor. I haven't any.

The Court: Do you desire to discuss the matter, gentlemen, or submit it?

Mr. Bucher: If the Court please, my admiration for this Court and my conviction that your Honor's ability to analyze this testimony and weigh the evidence, render a fair decision, far exceed any effort I might make. With the Court's permission, we submit the case, unless the Court desires an argument.

The Court: I would desire, without indicating on the part of the Court—I am directing my remarks to you also, Counsel.

Mr. Scholz: Yes, your Honor.

The Court: My view in the matter is that I would desire to have the photograph of the truck, depicting the truck as it was at the time of the accident. I would like some thought given by respective counsel to the matter of damages in this [214] case.

Mr. Bucher: With the Court's permission, may we then submit, by stipulation, pictures, photographs of the truck, and may counsel confer on the matter of damages, and then again confer with your Honor?

The Court: Mr. Scholz, I think that is probably the more expeditious way to handle it. Unless, of course, you desire to discuss the facts orally.

Mr. Scholz: Mr. Bucher has put my own ideas much better than I could. I think our view would be that your Honor can weigh this evidence very competently. I don't think there is any particular question of law involved. If there is, I think that on the question of law it would probably be better to brief it, but I don't see any question of law.

The Court: No, there isn't any question of law.

Mr. Scholz: And on the question of damages, of course, I think it is completely discretionary with the Court, in his own judgment, in case the Court should award a verdict for the plaintiff. But I do think your Honor should have those pictures, and we will stipulate that we will furnish your Honor

with the pictures, and I believe that the medical testimony should be offered in, too, as long as your Honor suggested it. Then the matter could be submitted, unless your Honor desires us to brief any particular point. If your Honor desires that, we can do it. [215]

Mr. Bucher: Well, Mr. Scholz, I think you will agree with me that acting on the Court's discussion, we should at least discuss the measure of the damages.

Mr. Scholz: Well, it is a difficult question for me to discuss, because, frankly, I don't know.

Mr. Bucher: That is a matter of routine at this time.

Mr. Scholz: I will be glad to discuss it, but I just don't know how far I could go, because it is quite a question.

The Court: Mr. Bucher, do you desire to submit any actuarial testimony in this case?

Mr. Bucher: In view of the stipulation as to the life expectancy—I might mention that it came about in this way: I first communicated with Mr. Scholz, in the nature of a pretrial conference, you might say, to avoid calling unnecessary witnesses. I told Mr. Scholz I would communicate with the actuaries in San Francisco, which I did. When I first communicated with them, I was mistaken as to the age, I gave the age as 48, and I communicated the life expectancy on that to Mr. Scholz. Then we found that the age should have been 49, which reduced the life expectancy about a year and a half. After that was done, we agreed upon the

life expectancy, which was stipulated to. We believe, therefore, that would obviate the necessity of calling an actuary. That was, of course, upon the assumption, as the testimony showed, that the deceased was in normal health at the time of the accident. [216]

Mr. Scholz: I don't think my stipulation went that far that he was in normal health at the time of the accident.

Mr. Bucher: I said the evidence showed that.

The Court: Well, there isn't any evidence in the record to the contrary.

Mr. Bucher: That is true. That is what I meant to say. It is assumed. Dr. Wirthheim testified, I believe, that from all of his evidence, the man was in normal health, and so did Dr. Ryan.

The Court: I would suggest, then, will you make the transcript available for me?

Mr. Bucher: I beg pardon?

The Court: Will this transcript be made available for me, has it been written up at all?

Mr. Scholz: I do not think it has been written up, your Honor. I think it would be a good idea if we can make the transcript available to the Court.

The Court: I am not inclined to burden either side with the expense. I have the facts pretty well in mind. I am just awaiting the photographs.

Mr. Bucher: I don't want to demur on the question of expenses.

The Court: No.

Mr. Bucher: At the same time, we have been

under heavy expenses here in this case right along, with a counsel in [217] Boston and witness fees and so forth. I have no idea what the cost would be, but I don't like to speak for the record on it.

The Court: No, and I am not instructing you to.

Mr. Scholz: Well, then, if your Honor please, if you wish, I may direct a letter to the Attorney General and we might authorize the expense of that. I don't know for sure.

The Court: I think it unnecessary. I have the facts pretty well in mind. I would like to have you provide me presently with a general idea of the nature of the truck's structure. Do you know how it is constructed?

Mr. Bucher: You mean the Army truck?

The Court: Yes, as to the visibility and so on. I am particularly concerned about the testimony of this witness, the last witness. He claims he saw the turn made by the car, when he was sitting facing east, as he claimed.

Mr. Scholz: Well, if your Honor please, I have ridden in many 6x6 trucks.

The Court: What?

Mr. Scholz: I have ridden in many 6x6 trucks. They are what we call "weapons carriers," too. I know you have a wide range of vision, unless everything is closed up.

The Court: Well, is there any way we can determine as to whether on the day in question, the side gates were down or up?

Mr. Scholz: I think Hammond could testify to

that, and perhaps Captain Jenkins could testify to it. That is about all. [218]

The Court: The testimony given by both the driver and the passenger is very unimpressive to this Court. I don't know that I need to go further, above and beyond the matter with respect to the negligence in this case. The testimony of the plaintiff showed that, by two distinct witnesses, that at the time and place in question there was a crash, the nature of which was of sufficient severity to attract their attention while seated at a desk in an adjacent building. They came out and found the cars in the position as indicated on the board. The impact was of sufficient intensity to cause the pickup truck to separate in the center. That, in turn, was the resultant, no doubt, from the erosion process of the acid, I assume, on the body of the truck. But the impact was grave, and if sufficient force to cause the rear end of the truck to be demolished, as indicated by the repairman. The Army truck was immediately in the rear of the deceased's truck. I believe, from a fair view of the evidence, that the driver of the Army truck was paying little or no attention to the stop signal, and he so testified. The occupant, Hammond, contradicts the driver in the very essential and prime particular. He stated that the driver was slowing his speed in order to meet the stop signal. I am satisfied that the driver was more interested in exculpating himself from any liability than he was in telling the absolute truth about this accident. I am satisfied that the deceased was where he should be

at the time and place in question, [219] and that the impact was of sufficient severity to cause his truck to cross the line, the property line or pedestrian line, and crash into the truck in front of him. The stop signal then indicated "Go," the truck in front proceeded on its way.

I therefore account for the damage done to the radiator of the truck driven by the deceased. As I say, Hammond's testimony is very unconvincing. Cross examination developed that it is at variance with the driver on essential particulars. The driver himself, immediately after the accident, in the presence of others, stated that the Army would repair the truck. Apart from that, we have the uncontradicted testimony of a disinterested witness, McNeil, who testified that the driver of the Army truck stated that he couldn't stop, or he couldn't apply his brakes, or something like that.

A significant factor in the whole case, as I view it, is the stop signal, and this Court has driven that particular area many, many times. It is perfectly apparent to the Court, and was at the time this accident took place, that that stop signal was perfectly visible, at least a block away. The driver's testimony that he could not see it, that it was screened by a street lamp, is not in accord with the facts.

Now, with respect to the casual connection between the immediate injury and the death of the deceased, there is no question in my mind but what the impact of the steering wheel upon the deceased at the time in question was traumatic, and [220]

that he suffered from that blow. He told his wife upon returning home that he felt the pain. There was shock, he could not eat. Dr. Ryan's testimony—after all, Dr. Ryan performed the operation, and made what I regard a rather heroic effort, in view of the prior medical advice given to the deceased, to save him. Dr. Ryan, in my opinion, is best able to testify with respect to what he found and what he saw, rather than the glittering generalities of experts who presume to testify without even a fair view of the record. I was not at all impressed by that testimony with respect to the defense. I say that not unkindly, but in the very nature of things, it is difficult for a man to read general statements, reports, findings, coroners' findings, and come to a definite fixed opinion. Dr. Ryan's testimony, I believe, is sufficient to justify this Court in concluding that the injuries sustained by the deceased at the time in question as outlined in the complaint, inevitably and directly and proximately resulted in his death thereafter, at an early date in January.

With respect to the length of time which elapsed between the injuries sustained and the death of the deceased, there was the advice given by the doctor in San Mateo, who testified that he suggested rest and diet. That may well have appeared to the doctor at the time he gave his advice as the proper thing. I direct no criticism toward him. But at least the deceased sought medical advice, and I do not regard the delay as [221] an element of neg-

ligence on the part of the deceased in any sense.

Now, so far as negligence is concerned, I have made my findings for the record. I desire aid from counsel with respect to damage.

Mr. Bucher: Very well.

The Court: Give me briefs on that within, let us say, ten days. I will then rule on the matter.

Mr. Bucher: Yes, your Honor.

Mr. Scholz: Do I understand, your Honor, then, that you want counsel for the palintiff to file a brief and then me to reply to it?

The Court: Yes.

Mr. Bucher: Yes.

The Clerk: Five and five?

The Court: Ten days to each side.

The Clerk: So that the record may hereafter be clear, about these exhibits that are produced to be marked?

The Court: Well, these exhibits with respect to the findings made by the coroner, the findings made by Dr. Carr, the pathological findings, I assume that Dr. Carr made the pathological?

Mr. Scholz: That is true.

Mr. Bucher: Yes, your Honor, he did.

The Court: He generally makes them. I wanted them in the [222] record in the event the case should ever be reviewed.

Mr. Bucher: I understand.

The Court: Merely for the purpose of identification. I have in mind what they reflect, because you referred to them, counsel, and you also referred to them.

Mr. Bucher: Yes, your Honor.

The Court: But it is very difficult, in the review of a case, unless all the records are made available so that you can get the whole picture. Bear in mind that our circuit is dealing with cold records. I try in every case, so far as I am able, to get the full picture as I see it here in court, into the record.

Mr. Bucher: That is true.

The Court: The matter of damage is the important question in this case, and it is difficult.

Mr. Bucher: It is difficult, your Honor.

The Court: It is not an easy question. So I expect adequate, able and conscientious help, and I know I will get it from both of you.

Mr. Bucher: We will do our best.

Mr. Scholz: If your Honor please, do I understand your Honor, that you do want these copies of the pathological and so forth?

The Court: Yes.

Mr. Scholz: I will make copies and submit copies to your [223] Honor.

The Clerk: And for the sake of the record, let it be noted that when they are produced, it will be, with the Court's permission, marked by me as follows: The pathological report will be Defendant's C, and the picture of the Army truck will be Defendant's D.

The Court: Well, I am not so much concerned with the pictures of the Army truck. I am not so much concerned with the picture of that. As I said, Hammond's testimony is not convincing. His testimony was diametrically opposed to that of the driver, and I can't say very much for it.

Now well, gentlemen, that is all. [224]

Friday, March 5, 1948, 4:00 o'clock p.m.

The Clerk: Fotopulos vs. United States, for further trial.

Mr. Bucher: Ready.

Mr. Scholz: Ready.

Mr. Bucher: Shall I proceed?

The Court: Yes. If I may suggest, you might make a prefatory note for the transcript so that we may have a sequence of the last hearing with this hearing, showing the reasons underlying this hearing.

Mr. Bucher: I shall. At the original trial a stipulation was entered into by and between the parties, showing the income of the deceased upon which taxes were based for the years 1941 to 1946, inclusive. We have since then endeavored to ascertain the income of the deceased for the five years prior to 1941. It will be shown by the testimony of these witnesses that the deceased filed no income tax return prior to the year 1940; that in 1935 he entered into a partnership agreement with a partner who will testify today as to the income for those years from 1935 to 1941, and '42. The auditor who audited the books of the P. F. Casing Company, which was the company owned and operated by the deceased, began the audit of those books only in 1941, and he will so testify. We have examined the records of banks with whom the deceased transacted business, and we will have present as a witness this afternoon the [225] offi-

cer of the Bank of South San Francisco, with his record showing deposits, both commercial and savings, of the deceased from 1935 on, and with that preliminary statement may I call my first witness?

The Court: Yes.

ARTHUR BIANCHI,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Q. Will you state your name to the Court? A. Arthur Bianchi.

Direct Examination

Mr. Bucher: Q. Mr. Bianchi, were you acquainted with Peter Fotopulos during his lifetime? A. What?

Q. Were you acquainted with Peter Fotopulos during his lifetime? A. Yes, I was.

Q. Were you ever engaged in business with him? A. Yes, sir.

Q. As a partner? A. Yes, sir.

Q. During the partnership did you each own an undivided one-half interest of the business?

A. Yes, sir.

Q. Did that partnership—I don't want to lead the witness, but I think I can expedite this. [226]

The Court: In these preliminary features you may.

Mr. Bucher: Q. Did that partnership agreement begin July 1, 1936 and include, or expire, I should say, about February 15, 1945?

A. Yes.

Q. Mr. Bianchi, did you and Peter Fotopulos share equally in the profits of the business? Did

(Testimony of Arthur Bianchi.)

either you or he ever withdraw more money at one time than the other withdrew? A. No, never.

Q. Do you know whether or not the partnership filed any income tax returns with the Treasury Department of the United States for the years 1936, '37, '38 and '39?

A. No, he never did.

Q. He did not. Did you file any returns for those years? A. No.

Q. Do you know what your net earnings from the business amounted to during the year 1937?

(Addressing the Court:) If the Court please, may he refer to certain records he has?

Mr. Scholz: Are those your original records? May I ask a question, your Honor?

The Court: Yes.

Mr. Scholz: Q. Mr. Bianchi, those records you have in your hand here are original records?

A. No, they are income tax statements.

Q. They are income tax statements?

A. Yes. [227]

Q. What year?

A. 1940, '41, '42, '43, and '44.

Mr. Bucher: I don't think the witness understood my question. I asked the witness what his net income amounted to for the six months in 1936 during which they were in partnership.

Q. How much did you earn in the year 1936 per week, or per month?

A. About \$40 a week.

Q. About \$40 a week?

A. That's right.

(Testimony of Arthur Bianchi.)

The Court: Q. Was that how much you earned, or how much you drew? Is that what you earned?

A. Yes.

Q. How much did the deceased earn?

A. The same thing.

Mr. Bucher: Q. In 1937 about how much was it?

A. About \$40 a week.

Q. That was your net earnings? A. Yes.

Q. And he earned about the same amount?

A. Yes.

Q. In 1938 how much did you earn?

A. About 45.

Q. About \$45 a week? A. Yes. [228]

Q. And Mr. Fotopulos earned the same?

A. Yes.

Q. In 1939? A. In 1939, about 50.

Q. About \$50 a week? A. Yes, sir.

Q. And he earned the same thing?

A. He earned the same thing.

Q. For the year 1940 did you and Mr. Fotopulos file income tax returns?

A. Yes, we did.

Mr. Bucher: He is now speaking from the records, Mr. Scholz.

Q. You have a copy with you of the original income tax return filed for the year 1940?

A. Yes, sir.

Q. How much was your net income for the business year 1940? A. \$4468.95.

Q. Was the net income of Mr. Fotopulos the same? A. The same thing.

(Testimony of Arthur Bianchi.)

Q. How much was it for the year 1941?

A. '41 was \$5387.23.

Q. And his also was the same?

A. The same.

Q. How much was it for the year 1942? [229]

A. \$6182.86.

Q. And Mr. Fotopulos' was the same?

A. Was the same.

Q. How much was it for 1943?

A. For 1943 it was \$7552.55.

The Court: Q. Was that all net?

A. All net income.

Mr. Bucher: Q. And his was the same?

A. His was the same.

Q. How much was it for 1944?

A. 1944 was \$12,262.56.

Q. And his also was the same?

A. The same.

Q. You sold the business back to him on February 15, 1945, did you? A. Yes, sir.

Q. What consideration did you receive for your one-half interest? A. \$14,500.

Mr. Bucher: That's all, if the Court please.

Mr. Scholz: If your Honor please, I should suggest that the best evidence of the income from 1940 to 1944, inclusive, would be the income tax returns, themselves, rather than his testimony, and I assume, if in the absence of the original, which would be filed with the Internal Revenue, that the copies [230] be filed with the Court.

(Testimony of Arthur Bianchi.)

The Court: I think that counsel has already laid the foundation that these are copies in the possession of this gentleman.

Mr. Bucher: That's true.

The Court: And he has done the accounting for the firm.

Mr. Bucher: Yes.

The Court: And the originals are filed with the Bureau of Internal Revenue.

Mr. Bucher: That's right.

The Court: Prior to that time no returns were filed?

Mr. Bucher: Yes.

Mr. Scholz: My suggestion is that the copies be offered in evidence.

The Court: They may be received in evidence and marked appropriately.

Mr. Bucher: We will offer the copies of Mr. Bianchi's, if you will furnish us the copies that you have, and I think they can all go in as one exhibit. Do you have any objection to them going in as one exhibit?

Mr. Scholz: No.

The Court: So ordered.

(The copies of income tax returns were marked Plaintiff's Exhibit 5 in evidence.)

Mr. Bucher: Any cross-examination, Mr. Scholz? [231]

Mr. Scholz: No.

CLARENCE J. BROWN,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Q. Will you state your name to the Court? A. Clarence J. Brown.

Direct Examination

Mr. Bucher: Q. Mr. Brown, what is your business? A. Public accountant.

Q. Are you the successor to the business of H. A. Dittmer, public accountant?

A. That's correct.

Q. Are you now the owner of that business?

A. I am.

Q. Have you succeeded to all of the records and documents from the office of H. A. Dittmer?

A. Yes, sir.

Q. And you are in possession of all of the records, are you? A. Yes, sir.

Q. I ask you if you have recently had occasion to examine the records pertaining to Peter Fotopulos for the P. F. Casing Company?

A. Yes, I have.

Q. Have you found in those records any record of income tax returns during the past few years?

A. Yes, I have.

Q. Was the first record that you have of an income tax return filed by Peter Fotopulos as an individual or as a partner of the P. F. Casing Company one of those you found? A. Yes.

Q. What year was that for? A. 1941.

Q. And you have a record in your office of a copy of the income tax returns? A. Yes, sir.

(Testimony of Clarence J. Brown.)

Q. Have you made a digest or a report of those returns, Mr. Brown?

A. I have checked them to the detailed records that are in the office, yes.

Q. Have you before you a report of those returns that you prepared?

A. In this folder I have his tax returns for the years 1941 to '46, with the exception of '44.

Q. With the exception of '44?

A. Yes, but I have an audit report of the State of California on his 1944 return.

Q. Have you checked back or verified the returns which he made for those years in any manner?

A. Well, I have checked them to certified copies that Mr. Dittmer made up and checked them to detailed monthly reports to [233] show they do.

Q. And they do?

A. Yes, they do tie up.

Q. Have you checked them with any state agency?

A. Not except with the Franchise Tax Commissioner for the year of 1943 and '4.

Q. And did you make that check?

A. Yes.

Q. And do they check?

A. They are materially correct, yes. There are slight corrections here under "Deductions" only.

Q. What you have just shown me are the reports of the Franchise Tax Commissioner?

A. Yes.

(Testimony of Clarence J. Brown.)

Q. Mr. Brown, are you prepared to advise the Court of the net earnings of Peter Fotopulos for the year 1941?

A. Well, in accordance with his tax return that was filed for that year—do you want net return?

Q. Yes, net return—net income.

A. Net income, his taxable income varies during the course of this five-year period. You would rather have that total?

The Court: Let us have the gross income.

A. \$5423.23.

The Court: Q. As to the partnership?

A. Individually. His net income after deductions was \$5301.08. [234] 1942, total income \$6235.86, net income \$5802.07. 1943, total income \$7872.55; net income \$7159.70. The State changed the 1943 income tax return disallowing certain of the deductions and made the revised net income, that is, after deductions, \$7379.70. 1944 I do not have any returned copies, but according to the Franchise Tax Commissioner his revised net income is \$12,351.27. 1945 net income is \$16,318.39.

Mr. Bucher: Q. After deductions?

A. No, that is before deductions.

Q. That is before deductions?

A. Yes. The tax return changed during that period.

The Court: Q. What is the net?

A. The net is standard deductions. He did not take any contributions or anything of that nature.

(Testimony of Clarence J. Brown.)

In 1946 the same thing. They took the standard deductions, so the total income is \$18,574.76.

Mr. Bucher: Q. You have no record of any audit or of any tax returns having been filed prior to the year 1941? A. No, sir.

Mr. Bucher: That is all, if the Court please.

Mr. Scholz: No questions.

The Court: Q. You are a certified public accountant?

A. No, just a public accountant.

Q. Have you rendered a report to your principals? [235]

A. No, sir, not a copy of this. There is no facilities for— Well, it is very difficult to certify the statements as being absolutely reasonable or correct, because there is no facilities for internal control.

Q. What do you mean by that?

A. The company has to be of larger size and have more internal control so there are no opportunities for certifying statements on income received and pay-out expenses that are not recorded.

Q. This co-partnership, as I understand it, kept books of account? A. Yes, sir.

Q. What books did they keep?

A. Books of original entry and a general ledger.

Q. Including journal, cash book, accounts receivable, accounts payable— A. Yes.

Q. And profit and loss statements?

A. Yes, monthly.

(Testimony of Clarence J. Brown.)

Q. Monthly profit and loss statements?

A. Yes.

Q. Did you examine them? A. Yes.

Q. Are the profit and loss statements in accordance with the ultimate return? A. Yes, sir.

Q. You made a check on that? [236]

A. Yes, sir.

Q. Did they keep books prior to 1940?

A. I don't have any record of that.

Q. Did you inquire?

A. I was successor to Mr. Dittmer, who took over the records, and prior to that time we were advised that Mr. Bianchi took care of the records. We have no copies of them.

Q. Do you have any means of determining the accuracy or inaccuracy of the statement made by the gentleman who preceded you on the witness stand, as to the income of approximately \$40 or \$45 a week?

A. My reaction to it is if in the year 1941 they made some \$5000 apiece, I didn't see how they could earn \$5000 on \$50 a week.

Q. How, in a business of this character, could you have a precipitous jump, as marked or sharp between \$40 a week and \$5000 a year?

A. It may be they took on a new product or expanded their services.

The Court: The business had to do with sausage cases?

Mr. Booker: That's correct.

The Court: Q. It was sort of a one-man affair?

A. Yes, sir.

(Testimony of Clarence J. Brown.)

Q. You have taken over then, have you?

A. I have taken over the accountant's records, yes, sir.

The Court: Who is operating the business now?

Mr. Bucher: When he took it over?

The Court: Yes.

Mr. Bucher: The business or partnership more or less ceased.

The Court: Q. Upon the death of Mr. Fotopulos, do I understand that the business more or less ceased? A. It ceased.

Q. Inoperative? A. Inoperative.

Q. Is that correct?

A. Yes, sir, they made a loss in 1947.

The Court: Do I recall correctly that when the widow was in Court she testified she undertook to operate the business, or have a relative operate it?

Mr. Bucher: She tried, but couldn't make it.

The Court: Mr. Fotopulos was the guiding person and he undertook to contact the accounts?

Mr. Bucher: Yes.

The Court: Who made the deliveries?

Mr. Bucher: Fotopolus or his partner, or an office boy he would have.

The Court: Do you have any questions, Mr. Scholz?

Cross Examination

Mr. Scholz: Q. From your knowledge of the business, could you say that that was a business that could only be [238] run by Mr. Fotopulos?

A. This particular business, yes, sir.

(Testimony of Clarence J. Brown.)

Q. No one else could run it?

A. That I couldn't say.

Q. That was the question I asked you.

A. It is difficult to say. I took the records over in December.

Q. Are you acquainted with how they conducted the business?

A. No, sir, when I took over they were not in existence.

Q. The only thing you know are the records they presented to you? A. Yes.

Q. Were you ever out there? A. No, sir.

Q. You never saw the place of business?

A. No, sir.

Q. I don't want to be argumentative, and you may not be able to answer this question, and if you cannot, just say so. Wouldn't it strike you that with the business of \$18,000 in 1946, that that business could be sold instead of being terminated with a loss for a few months in 1947?

Mr. Bucher: If the Court please, I object to that.

The Court: Sustained.

Mr. Scholz: That's all.

Mr. Bucher: May I recall Mr. Bianchi, for a moment? [239]

The Court: Yes.

ARTHUR BIANCHI,

recalled as a witness on behalf of plaintiff; previously sworn.

Redirect Examination

Mr. Bucher: Q. Mr. Bianchi, when you testified before, you stated, I believe, in the year 1939 your net income amounted to about \$50 a week, is that correct? A. Yes, sir.

Q. Which would be around \$2500 for the year, and in 1940 your income was \$4468.95, is that correct? A. Yes, sir.

Q. Nearly \$2000 more. How do you account for the increase of \$2500 for 1939 to \$4500 for 1940, if you can account for it? Did you take on any additional accounts, or what?

A. No, we worked more casings. We got a new place in Oakland, the Golden West Meat Company in Oakland.

Q. I didn't hear that.

A. We got the Golden West Meat Company, in Oakland.

Q. That increased the volume of your business substantially, didn't it? A. Yes, sir.

Q. That was the first year for which you filed an income tax return? A. Yes, sir. [240]

Mr. Bucher: That's all.

Cross Examination

Mr. Scholz: Q. Mr. Bianchi, you stated that in 1940 your income was \$4468, and then Mr. Fotopulos' income was \$4468, likewise, is that right?

(Testimony of Arthur Bianchi.)

A. Yes, sir.

Q. Then in 1944 you sold out—

A. No, 1945.

Q. Was that February 15, 1945?

A. Yes, sir.

Q. Was there any change in the method of your conducting your business from the time you started until the time you sold out? A. Any what?

Q. Any change in the method of conducting your business.

A. No, it went right along.

Mr. Scholz: That's all.

Redirect Examination

Mr. Bucher: Q. Your daughter kept the books during part of the time you were in partnership?

A. Yes, sir.

Q. Have you made a search of those old records?

A. I left everything down in the office and I don't know what became of them.

Q. You haven't found anything, yourself?

A. No. [241]

The Court: How long did you know the deceased, Mr. Fotopulos?

A. Oh, I knew him about ten years before.

Q. Did he always confine his activities to this type of business?

A. Since I know him, yes, since about 1925 or 1926 I know him.

Q. He was concerned with the business of the manufacture and sale and vending of cases?

(Testimony of Arthur Bianchi.)

A. No, he was working.

Q. Working for a day wage? A. Yes.

Q. What was his occupation?

A. Casing worker.

Q. Always casing? A. Since I know him.

The Court: That's all.

Mr. Bucher: That's all.

Mr. Scholz: That's all.

PETER BALESTRACCI,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Q. State your name to the Court?

A. Peter Balestracci.

Direct Examination

Mr. Bucher: Shall I proceed, your Honor?

The Court: Yes. [242]

Mr. Bucher: Q. Mr. Balestracci, what is your business or occupation?

A. Assistant cashier, Bank of South San Francisco.

Q. Were you acquainted with Peter Fotopulos during his lifetime? A. Yes, sir.

Q. Did you have any banking business transactions with him during his lifetime?

A. We did.

Q. Your bank, I mean. A. Yes, sir.

Q. Have you examined the accounts of Peter Fotopulos with your bank for a period of ten years last past?

A. Yes, sir, I have the records here.

(Testimony of Peter Balestracci.)

Q. You brought the records with you?

A. Yes.

Q. From those records I will ask you whether or not you could advise the Court as to the status of the savings account, if any, of the deceased, Peter Fotopulos, beginning with the year 1935.

A. From 1935 to 1939 there has been deposited in his savings account \$4375.

Q. Now, you are also acquainted with his commercial account, are you? A. I am. [243]

Q. I will ask you if you can state to the Court the deposits of the business annually, beginning with 1935? A. I have added these up.

Q. I beg your pardon?

A. I have added the amounts that were deposited to his commercial account. They amounted to \$7100 in 1936; \$14,200 in 1937; \$19,300 in 1938; \$31,300 in 1939; and \$30,200—

Q. That's all you brought with you?

A. That's right.

Q. Do you know anything about the net earnings of Peter Fotopulos during his lifetime?

A. Not exactly, with the exception of his income tax return record.

Q. You only know from the time he was filing income tax returns? A. Yes.

Q. Did you prepare some of them for him?

A. Yes.

Q. Do you recall for what years?

A. I can't recall the years exactly, but I think

(Testimony of Peter Balestracci.)

it was 1941 and 1942, but I am not positive of the years.

Q. You don't know anything about his net earnings prior to 1940? A. No, I don't.

Mr. Bucher: That's all. [244]

Cross Examination

Mr. Scholz: Q. Did Mr. Fotopulos ever borrow money from you during that period of time?

A. Off and on, yes, sir.

Q. On his note or security?

A. Mortgage and personal notes, also.

Q. And the mortgage was on some real property? A. Yes, sir.

Q. In South San Francisco? A. Yes, sir.

Q. What would the sums average, about?

A. I can't recall, exactly, but I think about three or four thousand.

Q. During what years was that?

A. Prior to 1940.

Q. But that was all secured by mortgage on the real property? A. Yes, sir.

Mr. Scholz: That's all.

Mr. Bucher: That's all. May this witness be excused?

The Court: Yes.

Mr. Bucher: That is the only evidence we can produce, your Honor.

The Court: Mr. Scholz, and counsel, many weeks have elapsed and the case was partially submitted by reason of your absence from the jurisdiction. I indicated to Mr. Mitchell that I desired this testimony with respect to the earnings spread over [245] a period of time.

With respect to the negligence aspects of the case, there was no question in my mind of the trial, nor is there any question in my mind now that the rear end collision which took place in the vicinity of Bush and Van Ness Avenue immediately opposite the automobile salesrooms of Neil McNeil & Company, that that accident was the result of and proximately caused by the negligence of the driver of the Army truck. The impact on the rear end, as I recall, was of sufficient force to cause this truck's steering wheel to protrude into the stomach of the deceased. There was a buckling operation. The truck of the Army was quite heavy and the truck that the plaintiff was driving was a light pickup type, and by some chemical process having eroded the structure of the light truck may have contributed to the lack of density in the steel, but in any event the impact was a forceful one, causing, as I have said, the steering wheel to protrude into the stomach of the deceased, or at least he registered that complaint immediately thereafter to his wife.

What is your position, Mr. Scholz, with respect to the causal relationship, having in mind the medical aspects of the case?

Mr. Scholz: As I understand your Honor's question, it is, would the impact be sufficient to cause his death? Is that your Honor's question?

The Court: There is no evidence in the record denying the impact. That stands uncontradicted. We must accept that.

Mr. Scholz: But how forceful that impact was I cannot say. I think that is purely a question for

the Court. The testimony varies. You may recall that the Army captain testified that the mud was knocked off the back part, and then, on the other hand, you have testimony that there was a buckling of the body of the pickup truck. I don't think that is undisputed, but I think it is purely a question for the Court to decide which was which.

The Court: Has the transcript been written up?

Mr. Bucher: No, it has not been. The testimony was to the effect that there was a puncture of the bowel and peritonitis followed, and death followed practically immediately after the operation. That was Dr. Ryan's testimony.

The Court: Dr. Russell Ryan testified in the case, and I recall that was his testimony.

Mr. Scholz: In view of the fact that some time has elapsed since we have heard the evidence, it might be well to have the testimony written up.

Mr. Bucher: Dr. Ryan testified as to the condition of the deceased when he first examined him, the condition on operation, the condition as disclosed, and the autopsy findings were submitted in the record.

The Court: The deceased visited a doctor in San Bruno [247] who testified. Of course, there is the contention that if that doctor had intervened sooner in the case he might have saved the man's life. I am not passing upon that phase of it, nor am I criticizing the doctor, at all, but there seemed to be, according to my best recollection, a period of four or five or six days that intervened.

Mr. Fotopulos was unruly and hard to manage,

and would not subject himself to any medical examination. That is the testimony of his wife. However, he did send for this doctor, who tried to give him some superficial treatment and give him some pills. The pain became increasingly more difficult for the man to bear, and his wife called in Dr. Ryan's assistant first, and then, the next morning, Dr. Ryan. As I recall Dr. Russell Ryan's testimony, he observed what he regarded as a surgical stomach, and immediately ordered him to the hospital. He recommended immediate hospitalization and surgery.

Dr. Russell Ryan's findings are embraced in the report, are they?

Mr. Bucher: Yes, your Honor.

The Court: Peritonitis?

Mr. Bucher: Yes, peritonitis. He said there was no question about the rupture of the bowel.

The Court: Is there any evidence in the record concerning a condition of appendicitis?

Mr. Bucher: He said the appendix was approximately normal. [248] He first suspected an appendix before operation, but on operation found the appendix was normal.

The Court: He had a suspicion, that's right. The appendix was normal.

Mr. Bucher: Yes.

The Court: What did Dr. Carr find on the appendix?

Mr. Bucher: Normal.

The Court: Does the record show that immediately after this accident that the deceased, Mr.

Fotopulos, repaired to his home and did no further work?

Mr. Bucher: The record shows he repaired to his home and complained to his wife that he was nauseated and he vomited, and the next morning he went to work under distress and worked a few hours after that, but still complaining in an increasing manner of pain until finally she persuaded him—

The Court: Is that an accurate statement, Mr. Scholz? Bear in mind that I have tried many cases since this, Counsel.

Mr. Scholz: It is difficult for me to recall it.

The Court: In fairness to the Government, to the plaintiff, and to the Court, I think it only fair to ask this transcript be written up.

Mr. Bucher: The Court will recall that at the time it was tried the question came up as to whether it should be written up and the Court indicated then it desired some evidence of earning power and it would not be necessary to have the record [249] written up. The Court was of the opinion as indicated today. That is our position. The statement which I made to the Court I know so well that I know my statement is correct and would be sustained by the record. I don't want to dispute Mr. Scholz on the matter, but I know it is correct.

Mr. Scholz: You are not disputing me. I did not question that.

The Court: Will the Government have the record written up?

Mr. Scholz: Yes, the Government will have the

record written up if it will assist the Court, of course.

The Court: I was inclined to view at the summation of the case that there was a causal relationship between the injury and the ultimate death. My recollection then was, of course, better than my recollection now of the facts. Many matters have transpired. Lurking in my memory, however, is the matter of this appendix, prior complaint was made, and on that phase I should like to examine the record.

According to Dr. Russell Ryan's findings there was no showing of trauma or evidence of trauma. Am I correct?

Mr. Bucher: That's correct, there was no objective finding prior to operation. He stated in his testimony that his conclusion was based upon specific findings on operation, and he analyzed clearly the relationship between the nerve and the transverse colon, the deficiency in the blood supply [250] causing the perforation which follows a trauma as indicated by the deceased. Dr. Ryan analyzed that very clearly from the witness stand.

The Court: Did the Government present any medical?

Mr. Scholz: Yes, we did.

Mr. Bucher: Your medical consisted of the gentleman from the Navy Hospital.

Mr. Scholz: Yes.

The Court: Yes, the gentlemen from the Navy Hospital. But they never saw the deceased.

Mr. Scholz: They never saw the deceased.

The Court: And never made made an examination.

Mr. Scholz: Their testimony was purely from the record.

The Court: And one gentleman, as I recall, testified only on a hypothetical.

Mr. Bucher: They both testified on hypothetical cases.

Mr. Scholz: Yes, in the sense that all they did was examine the pathological and other records in the case and testified from the pathological and other records in the case.

The Court: Very well, gentlemen, the matter may stand submitted when as and if the transcript is received. [251]

[Endorsed]: Filed April 1, 1948.

[Endorsed]: No. 12066. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Diamond Fotopulos and Thomas Fotopulos and Joan Fotopulos, minors, by and through their guardian ad litem, Diamond Fotopulos, Appellees. Transcript of Record. Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 18, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit.

No. 12066

THE UNITED STATES OF AMERICA,
Appellant,

vs.

DIAMOND FOTOPULOS and THOMAS FOTO-
PULOS, and JOAN FOTOPULOS, minors, by
and through their guardian ad litem, Diamond
Fotopulos,

Appellees.

STATEMENT OF POINTS

To the Clerk of the above-entitled Court:

The appellant hereby designates the Statement of Points to be Relied Upon on Appeal which it filed with the Clerk of the United States District Court at San Francisco, California, on August 20, 1948, as its Statement of Points to be Relied upon on Appeal in the United States Court of Appeals for the Ninth Circuit.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Appellant.

[Endorsed]: Filed December 16, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

To the Clerk of the above-entitled Court:

The appellant hereby designates the Praecipe for Preparation of Record on Appeal which it filed with the Clerk of the United States District Court at San Francisco, California, on August 20, 1948, at its Praecipe for Preparation of Record on Appeal in the United States Court of Appeals for the Ninth Circuit.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Appellant.

[Endorsed]: Filed December 16, 1948. Paul P. O'Brien, Clerk.